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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

Case No. 12-12020-mg

RESIDENTIAL CAPITAL, LLC, et al.,
Debtors.

- - - - -x

JENKINS ET AL.,

Plaintiffs,

-against-

Adv. Proc. No. 12-01935-mg

RESIDENTIAL FUNDING COMPANY, LLC ET AL.,
Defendants.

- - - - -x

SOLANO,

Plaintiff,

-against-

Adv. Proc. No. 13-01255-mg

GMAC MORTGAGE LLC, ET AL.,
Defendants.

- - - - -x

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HAWTHORNE,
Plaintiff,
-against- Adv. Proc. No. 12-02050-mg
GMAC MORTGAGE LLC,
Defendant.
- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

June 12, 2013
10:07 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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2 Doc# 2511, (CC: Doc no. 3343) Status Conference Re: Motion to
3 Approve Motion By Ally Financial Inc. and Ally Bank for an
4 Order Enforcing the Automatic Stay Pursuant to 11 U.S.C. 362
5 (a)(3) By (1) Enjoining Prosecution of Alter Ego and Veil
6 Piercing Claims in the Class Action Entitled Landon Rothstein,
7 Et Al. v GMAC Mortgage, LLC Et Al., and (2) Declaring Such
8 Claims Void Ab Initio

9

10 (CC: Doc# 3374, 3375) Status Conference RE: Debtors Motion for
11 Entry of an Order to Permit the Debtors to Continue Using Cash
12 Collateral.

13

14 (CC: Doc no. 3911, 3912) Debtors' Motion for Entry of an Order
15 Further Extending Their Exclusive Periods to File a Chapter 11
16 Plan and Solicit Acceptances Thereof filed by Gary S. Lee on
17 behalf of Residential Capital, LLC.

18

19 Doc# 3733 Motion for Relief from Stay

20

21 Doc# 3829 Debtors Application Under Bankruptcy Code Sections
22 327(a) and 328(a) for Entry of an Order Approving Fourth
23 Addendum to Engagement Agreement with FTI Consulting, Inc. as
24 Financial Advisor to the Debtors, Authorizing Provision of
25 Litigation Support Services Nunc Pro Tunc to March 1, 2013

Doc# 3626, 3872 Debtors' Amended Motion for Entry of an Order Under 11 U.S.C. 105 and 363 Authorizing the Debtors to Partially Satisfy Certain Secured Claims.

(CC: Doc# 3830) Debtors' Motion Pursuant to Section 362(a) of the Bankruptcy Code for Enforcement of the Automatic Stay.

(CC: Doc# 2604) Motion for Relief from Stay

(CC: Doc no. 2935) Adj. Hearing RE: Motion to Extend Time For Julio Solano To File Proof Of Claim (related document(s)2934) filed by Richard Sax on behalf of Julio Solano.

(Doc no. 3315) Hearing RE: Letter to the Honorable Judge Glenn re: acceptance of tardy claim filed by Donna Chinloy.

(CC: Doc# 3187) First Application for Interim Professional Compensation (First Interim Application of Pepper Hamilton LLP as Special Foreclosure Review Counsel for Bankruptcy Issues for the Debtors for Compensation and Reimbursement of Expenses Incurred for the Period May 15, 2012 through December 31, 2012) for Pepper Hamilton LLP, Special Counsel, period: 5/15/2012 to 12/31/2012, fee:\$2,226,584.25, expenses: \$87,327.73.

1

2 12-12019-mg Residential Funding Company, LLC Ch. 11

3 Adversary proceeding: 12-01935-mg Jenkins et al v.

4 Residential Funding Company, LLC et al. (CC: Doc no. 1)

5 Adjourned Case Management Conference.

6

7 Adversary proceeding: 12-02050-mg Hawthorne v. GMAC MORTGAGE,

8 LLC (CC: Doc no. 1) Adj. Pretrial Conference

9

10 Adversary proceeding: 13-01255-mg Solano v. GMAC Mortgage LLC

11 et al. Status Conference

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UNITED STATES DEPARTMENT OF JUSTICE

Office of the United States Trustee

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New York, NY 10004

BY: BRIAN S. MASUMOTO, ESQ.

ALSO PRESENT:

SHARON JENKINS, In Pro Per/Pro Se

1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right. We're here
3 in Residential Capital, number 12-12020.

4 Mr. Marinuzzi?

5 MR. MARINUZZI: Good morning, Your Honor. Lorenzo
6 Marinuzzi, Morrison & Foerster, on behalf of the debtors.

7 We have, Your Honor, a fairly lengthy agenda this
8 morning, but the first matter that's up for this morning is
9 found on page 13 of the agenda. It's a status conference with
10 respect to the motion by AFI and Ally Bank to enforce the
11 automatic stay with respect to an action we refer to as the
12 Rothstein action.

13 The motion was filed on December 21st by AFI. They
14 filed the motion after consulting with the debtors about the
15 nature of the complaint that was asserted, that was filed
16 originally against GMAC and then amended to drop GMAC as a
17 defendant. The committee filed papers with respect to the
18 motion, hasn't taken an official position on it yet. The
19 debtors have actually joined in AFI's motion. And so far the
20 parties have not scheduled a hearing date on this.

21 As we continue to negotiate, we think the appropriate
22 way to deal with the issue, because the issue that's central to
23 this is whether the claims asserted by the plaintiffs in the
24 action against Ally Bank and AFI are really estate causes of
25 action that belong to the estate, or whether they're

1 independent parties, and so we're trying to figure out the
2 right approach to deal with the legal and factual issues with
3 the backdrop of the PSA and the contemplated plan.

4 THE COURT: Where's the case pending?

5 MR. MARINUZZI: The case is pending in the Southern
6 District of New York.

7 THE COURT: Before whom?

8 MR. MARINUZZI: Before Judge Nathan. We've spoken
9 with counsel for AFI, with the committee, and with the
10 plaintiffs. I think all of us have various positions on this
11 that we'd like to share with the Court. I'll defer to Mr.
12 Schrock, who's sitting behind me, who actually filed a motion
13 on behalf of AFI.

14 MR. SCHROCK: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. SCHROCK: Ray Schrock, Kirkland & Ellis, on behalf
17 of AFI and Ally Bank.

18 Your Honor, we did file this motion because we feel it
19 raises very fundamental issues to the case and the law of the
20 case that are subject to the exclusive jurisdiction of this
21 court, that is, specifically what is an estate claim. We saw
22 various parties, including the Rothstein parties, that we
23 believe were framing up estate claims under a different name.
24 We didn't want those rights being affected for a lot of
25 reasons.

1 Since that time, we've worked with the debtors and the
2 committee. And I think, Your Honor, in light of the PSA, the
3 debtors and the committee are effectively going to take over
4 prosecution of the motion. And the committee asked me, about a
5 week and a half ago, could we put this off for some time and
6 give them time to put some further briefing into it and also
7 look at the issues. And I think that really these are
8 confirmation issues, at the end of the day.

9 THE COURT: What's the status of the Rothstein action?

10 MR. SCHROCK: It is stayed, Your Honor, pending -- and
11 there's no date certain for it to be reinstated, pending this
12 Court's determination as to whether or not the causes of action
13 are estate claims.

14 THE COURT: Have you had a conference before Judge
15 Nathan?

16 MR. SCHROCK: Your Honor, I believe that -- I've not
17 appeared in the case, but I believe so.

18 THE COURT: Okay.

19 MR. SCHROCK: So Your Honor, I'm happy to answer any
20 questions, but we believe that these matters are properly heard
21 in conjunction with the confirmation of a plan.

22 THE COURT: All right. Anybody else want to be heard
23 with respect to this Rothstein action?

24 MR. MANNAL: Your Honor, Doug Mannal, on behalf of the
25 creditors' committee.

1 Your Honor, in light of the plan support agreement and
2 the proposed plan that will be filed with the disclosure
3 statement on July 3rd, we thought this was better suited to be
4 heard in connection with confirmation of the plan. We were
5 somewhat confused by the motion when it was made. We think it
6 really is a core issue to the case, but again, better heard as
7 part of the confirmation hearing. That's why we had asked for
8 further adjournment. And in light of the filing of the PSA and
9 the global settlement, it's our intent to likely put in
10 additional briefing on this motion.

11 THE COURT: Thank you.

12 Counsel, come on up.

13 MR. STRAUSS: Good morning, Your Honor. Mark Strauss
14 from Kirby McInerney. We're counsel to the plaintiffs in the
15 Rothstein action, which is a punitive class action in the
16 Southern District of New York before Judge Nathan.

17 Judge, just to make a couple of corrections for the
18 record. The case is not stayed. The case is proceeding
19 against other defendants. There are defendants affiliated with
20 an insurance company called Balboa that ac --

21 THE COURT: Is this a force-placed insurance case?

22 MR. STRAUSS: Yes, it is. Those claims are
23 proceeding. There's a fully-briefed motion to dismiss before
24 Judge Nathan. The claims as to Ally Bank and Ally Financial
25 are not stayed either. Those parties' time to respond to the

1 complaint is adjourned until resolution of these bankruptcy
2 issues that were raised in the motion.

3 THE COURT: Is it exclusive a force-placed insurance
4 case?

5 MR. STRAUSS: Yes, it is exclu -- exactly. There are
6 no issues as to foreclosure or anything else.

7 What we are seeking is a hearing and a ruling on a
8 very discrete issue, legal issue that was raised by the initial
9 papers, and other counsel adverted to it, and that is an issue
10 of what claims are estate claims.

11 We are focused on the claims that we have against Ally
12 Bank. We do not believe those claims --

13 THE COURT: Ally Bank, as opposed to AFI?

14 MR. STRAUSS: Correct. We believe that the Ally Bank
15 claims that we've asserted are not estate claims by any
16 stretch. Those claims are not alter ego or veil piercing
17 claims. They are based upon breach of contract and respondeat
18 superior.

19 THE COURT: Tell me who's the putative plaintiffs.
20 It's a class action, right?

21 MR. STRAUSS: Yes, the putative plaintiffs are
22 borrowers. They're servicing -- they're borrowers whose
23 mortgage loans were serviced by GMAC Mortgage, LLC.

24 The claims as to Ally Bank have no allegations of
25 domination or control.

1 THE COURT: What are the claims against Ally Bank
2 based on?

3 MR. STRAUSS: The claims against Ally Bank are based
4 upon breach of contract and respondeat superior. As for the
5 breach of contract claims --

6 THE COURT: Was Ally Bank a mortgagee on specific
7 loans? Is that --

8 MR. STRAUSS: Yes. Ally Bank owns the loans and/or
9 owns the servicing rights of the loans, and we allege that they
10 stand in the shoes of the original lenders and are obligated on
11 the mortgage loan contracts and are obligated for their breach.

12 THE COURT: Was GMAC a subservicer for Ally Bank
13 or --

14 MR. STRAUSS: Yes.

15 THE COURT: -- servicer for Ally Bank?

16 MR. STRAUSS: Yes. And we also allege that Ally Bank
17 appointed GMAC Mortgage as its agent, as its servicer, and that
18 it's responsible, under respondeat superior, under ordinary
19 agency principles, for the torts committed by GMAC Mortgage.

20 In addition, there was a subservicer by the name of
21 Newport Management Company, which doesn't have anything to do
22 with the debtors. And we allege that the subservicer also
23 committed torts against --

24 THE COURT: Subservicer for whom?

25 MR. STRAUSS: For --

1 THE COURT: Under contract with whom?

2 MR. STRAUSS: They contracted with GMAC Mortgage on
3 the consent of Ally Bank, so they're a subagent. And the
4 principal, Ally Bank, we allege, is responsible for the torts
5 of the subagent as well, under this respondeat superior theory.

6 THE COURT: I didn't look at the docket sheet in the
7 district court, so I'm not familiar with what's transpired.
8 When is -- you say Balboa's made a motion to dismiss. When is
9 that going to be heard?

10 MR. STRAUSS: There hasn't been a date set.

11 THE COURT: Is it fully briefed?

12 MR. STRAUSS: Fully briefed, yes.

13 So the parties that have moved, in their papers, they
14 try to conflate the claims that we've pled against Ally
15 Financial and Ally Bank. But there really are distinct claims
16 and distinct pleadings as to each one, and the claims against
17 Ally Bank are not derivative, by any stretch.

18 So this is a threshold issue for us going into
19 confirmation. If the Court rules that the claims are
20 derivative, then we have nothing more to do. If the Court
21 rules that the claims belong to us, then we have to consider
22 the third-party releases and whether to object. And I would
23 submit that a hearing and a ruling on this discrete narrow
24 issue would help all the parties, would narrow the issues for
25 all the parties going forward.

1 THE COURT: Is the motion before me fully briefed?

2 MR. STRAUSS: From our point of you, yes. And we
3 don't think there's any discovery required for this issue.
4 This is simply a matter of what's pled in the complaint and
5 what the law is.

6 THE COURT: All right. Let me hear -- anybody else
7 want to be heard on this?

8 MR. STRAUSS: Thank you, Your Honor.

9 THE COURT: Thank you.

10 MR. MANNAL: Your Honor, Doug Mannal, on behalf of the
11 creditors' committee again.

12 Your Honor, we did not address in our papers the issue
13 as to whether or not these are direct claims. To the extent
14 we're going to have a hearing on whether or not the claims
15 against Ally Bank are direct claims under an agency theory,
16 we'd ask to be able to put in additional briefing on that.

17 THE COURT: Here's what I'd like done. The parties
18 who want to be heard on this motion, I want them to confer, to
19 agree on a schedule that -- because what I'm hearing from
20 counsel today, this issue of whether they're direct or
21 derivative claims is perhaps not ultimately determinative of
22 the outcome, but may well be. Certainly, even if they're
23 direct claims, meaning that they are claims that don't belong
24 to the estate but belong to the plaintiffs, the Court has
25 authority to stay prosecution of those claims against the

1 nondebtor parent in connection with other pending actions
2 around the country, including some in the Southern District of
3 New York.

4 The Court had previously entered a preliminary
5 injunction. Most of those were resolved with consent orders.
6 One required a decision by the Court. So the Court would have
7 authority to stay the actions. That doesn't mean that that's
8 the most appropriate result at this point. But obviously, if
9 the claims are derivative claims, they do belong to the estate
10 and they couldn't be prosecuted by the plaintiffs. And the
11 decision of whether they're derivative and therefore property
12 of the estate, is clearly a matter for the bankruptcy court to
13 decide.

14 So what I'd like is for parties to confer, agree on a
15 schedule. I'll permit one more round of briefs that just
16 address that. And I don't remember what omnibus dates we have
17 in July or August, but work with Mr. Strauss about coming up
18 with an agreed schedule that would have this motion heard in
19 July or August.

20 It may well be that the decision of the Court would
21 be, whether they're direct or derivative, is to put a stay in
22 place with respect to Ally Financial. I've done that -- that's
23 happened before, as I've referenced. And then it may well be a
24 confirmation issue. If the plaintiffs object to confirmation
25 on the grounds of the scope of the third-party nondebtor

1 release, I mean, that's -- we'll have to deal with that. But I
2 think, in the first instance, let's get the rest of the
3 briefing done and get the matter on the calendar for a ResCap
4 omnibus day.

5 Okay, Mr. Marinuzzi?

6 MR. MARINUZZI: We'll do that, Your Honor.

7 THE COURT: All right. Mr. Strauss, you'll work with
8 other counsel in trying to work out a schedule on that?

9 MR. STRAUSS: Yes, Your Honor.

10 THE COURT: One other question, Mr. Strauss. I don't
11 know what Judge Nathan's practice is in terms of scheduling
12 motions, so I don't know whether you expect to hear from her
13 that a date's going to be set or -- do you know?

14 MR. STRAUSS: I don't know, Judge.

15 THE COURT: Okay. So certainly -- are there any
16 conferences -- case management conferences scheduled with Judge
17 Nathan at this point?

18 MR. STRAUSS: No.

19 THE COURT: All right. Mr. Schrock, is Judge
20 Nathan -- did you file something in the district court
21 referencing what you believe the issues are as to whether these
22 are derivative claims? You know, I think Judge Nathan has

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1 had -- she's had a couple of appeals from decisions of mine,
2 and I'm not sure whether they've been in ResCap. There have
3 been so many appeals that are just spread all over the district
4 court; I just don't know whether she's had one or not.

5 MR. SCHROCK: Yes, Your Honor, there is a stipulation,
6 I believe, entered in -- I'll have to take a look at the docket
7 sheet, but I believe it was last -- in March, letting the court
8 know that this issue was --

9 THE COURT: Okay.

10 MR. SCHROCK: -- before the court.

11 THE COURT: Okay. If you would send a copy of that.
12 That's filed in the district court, I take it?

13 MR. SCHROCK: Yes, Your Honor.

14 THE COURT: If you would send a copy to me, copy to
15 other counsel on the case in the district court, so they see
16 what you've sent me, okay? All right. Thank you very much.

17 MR. SCHROCK: Thank you.

18 MR. MARINUZZI: Your Honor, the next item on the
19 agenda is the status conference with respect to debtors' cash
20 collateral motion. I'll cede the podium to Todd Goren.

21 THE COURT: Thank you.

22 MR. GOREN: Thank you, Your Honor. Todd Goren,
23 Morrison & Foerster on behalf of the debtors.

24 We had hoped to have this resolved by the time we got
25 here today. I think we are close. We sent the junior secured

1 bonds a stipulation last week that would have resolved this.
2 We're still waiting for some comments back to that. In the
3 meantime, I think what we'd like to do at this point is just
4 adjourn the hearing to the 26th and we'll work -- we're working
5 with the junior secured bonds either to finalize the
6 stipulation resolving this, or a stipulation extending use of
7 cash collateral through that date. But in the meantime, all
8 parties' rights are reserved on all issues.

9 THE COURT: All right. Anybody want to be heard for
10 the junior secured notes?

11 Mr. Uzzi, come on up.

12 MR. UZZI: For the record, Gerard Uzzi of Milbank,
13 Tweed, Hadley & McCloy, for the ad hoc committee of junior
14 secured notes.

15 Just simply to confirm what Mr. Goren said, Your
16 Honor, we agree that the parties' rights are preserved, pending
17 coming back before your court.

18 THE COURT: Okay. The only thing I would say to both
19 of you is that I'm hopeful you'll work this out by stipulation.
20 I don't want to find out on June 25th that I'm having a
21 contested hearing on June 26th because use of cash collateral
22 is about to expire. So I don't want -- okay, no bad
23 surprise -- if there's a bad surprise, make sure you tell me
24 well in advance. Okay?

25 MR. UZZI: That's fine, Your Honor. I mean, I think

1 we can say the anticipation actually is that we're going to
2 agree -- have an agreed termination --

3 THE COURT: Okay.

4 MR. UZZI: -- of the use of cash collateral. So I
5 think we'll get there, Your Honor.

6 THE COURT: All right. Thanks very much.

7 All right. Thanks, Mr. Goren.

8 Mr. Marinuzzi?

9 MR. MARINUZZI: Your Honor, you just mentioned bad
10 surprises; I think we have a good surprise here. Under the
11 heading "uncontested motions" is the debtors' motion to further
12 extend their exclusive plan filing and solicitation periods.
13 The request is supported by the UCC.

14 Your Honor entered a bridge order last week that
15 continued exclusivity through today. The motion seeks a
16 further continuation for August 21st for filing and October
17 21st for solicitation. In support of the request, the debtors
18 submitted the declaration of Lewis Kruger, who's seated behind
19 me, the CRO. We've negotiated a PSA; it's up for hearing on
20 the 26th.

21 I think the debtors have made tremendous progress
22 working side by side with the committee and with the creditors
23 in the case to push the case forward, and unless the Court has
24 any questions, we'd ask that the extension be granted.

25 THE COURT: Anybody else wish to be heard?

1 Mr. Mannal?

2 MR. MANNAL: Your Honor, Doug Mannal, Kramer Levin, on
3 behalf of the creditors' committee.

4 Your Honor, I echo Mr. Marinuzzi's comments. I
5 believe we have made substantial progress towards a largely
6 consensual Chapter 11 plan. The limited relief on the
7 extension of exclusivity is to allow the parties time to file
8 the plan support agreement -- or approve the plan support
9 agreement and file the plan and disclosure statement on the 3rd
10 of July, and have a hearing on the disclosure statement. And
11 that's what's intended to be accomplished in this next period
12 of exclusivity extension.

13 THE COURT: Thank you. Anybody else wish to be heard?

14 All right. The motion is granted.

15 MR. MARINUZZI: Thank you, Your Honor. That brings us
16 to the motion of the City of Evansdale, Iowa for entry of an
17 order modifying the automatic stay to allow condemnation.
18 Samantha Martin, seated behind me, is in the process of
19 negotiating a stipulation that hopefully resolves it, Your
20 Honor. I don't know if Your Honor has any questions regarding
21 the motion, but I'm happy to have Samantha Martin address them.

22 THE COURT: I don't. So what -- are you going to
23 adjourn this till --

24 MR. MARINUZZI: Till July 10th.

25 THE COURT: -- July 10th.

1 MR. MARINUZZI: I'm sorry; June 26th --

2 THE COURT: June 26th.

3 MR. MARINUZZI: -- right.

4 THE COURT: That's fine.

5 MR. MARINUZZI: Okay. And Your Honor, that brings us
6 to contested matters on page 18.

7 THE COURT: Okay.

8 MR. MARINUZZI: Actually, there's an interim order.
9 Okay.

10 THE COURT: I'm sorry?

11 MR. MARINUZZI: Okay. Your Honor, Erica Richards
12 tells me that I missed the application to retain FTI, which is
13 at the top of page 18, and I apologize for that. I'm going to
14 cede the podium to Erica who will present the application.

15 THE COURT: Thank you.

16 MS. RICHARDS: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MS. RICHARDS: Erica Richards of Morrison & Foerster,
19 appearing on behalf of the debtors.

20 As my colleague, Mr. Lorenzo (sic), indicated --

21 THE COURT: Mr. Marinuzzi.

22 MS. RICHARDS: Mr. Marinuzzi. Thank you, Your Honor.

23 THE COURT: Can I introduce the two of you?

24 MS. RICHARDS: We're on a first-name basis.

25 The next matter is the debtors' application seeking

1 approval of a fourth addendum to the retention of FTI
2 Consulting, INC., the debtors' financial advisor. That
3 application essentially seeks approval of certain litigation
4 support services that were excluded from FTI's original
5 application. I think the notable point is that it seeks nunc
6 pro tunc relief to March 1st for services FTI provided in
7 connection with the debtors' subordination complaint that was
8 filed in February. Fees for those services run approximately
9 150,000 dollars to date.

10 After filing the application, the debtors and FTI
11 consulted with counsel to the committee and agreed to modify
12 the language in the order to clarify that the services being
13 sought now relate solely to the subordination complaint. And
14 to the extent the debtors and FTI are seeking --

15 THE COURT: I assume the work is stopped for now.

16 MS. RICHARDS: Yes, correct. That work has already
17 been done, but it was done. And to the extent FTI is asked to
18 perform other of these litigation support services, they'll
19 file a declaration on seven days' notice with the Court. It
20 will hopefully eliminate the need for us to keep coming back
21 seeking additional applications.

22 THE COURT: All right. Anybody else wish to be heard
23 with respect to this application to expand the scope of the FTI
24 engagement?

25 All right. It's granted.

1 MS. RICHARDS: Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. MARINUZZI: Your Honor, this brings us to the
4 three foreclosure-review related applications to retain and pay
5 PWC, Hudson Cook, and Pepper Hamilton. We submitted to
6 chambers a further interim order extending the final hearing
7 date to July 10th. We're still negotiating with the Fed. We
8 expect to come back to the Court soon. So we'd ask that the
9 orders be continued on an interim basis through July 10th.

10 THE COURT: Anybody else wish to be heard with respect
11 to -- so just so it's clear, it's PWC --

12 MR. MARINUZZI: Correct, it's PWC --

13 THE COURT: Pepper Hamilton.

14 MR. MARINUZZI: -- and Hudson Cook.

15 THE COURT: Hudson Cook.

16 MR. MARINUZZI: Correct.

17 THE COURT: Anybody wish to be heard with respect to
18 those applications?

19 All right. Granted. I hope to hear from you soon,
20 Mr. Marinuzzi.

21 MR. MARINUZZI: I hope so, Your Honor. And that takes
22 us, Your Honor, to page 24 of the agenda, and the debtors'
23 motion to pay down certain secured claims. I'll cede the
24 podium to Todd Goren again.

25 THE COURT: Okay.

1 MR. GOREN: Thank you, Your Honor. Todd Goren,
2 Morrison & Foerster on behalf of the debtors.

3 Before you is the amended motion of the debtors
4 seeking authority to pay down approximately 1.1 billion dollars
5 to Ally Financial, subject to a reservation of rights, in the
6 event that the settlement embodied in the plan support
7 agreement and a plan is not ultimately approved, and to pay
8 down 800 million of junior secured bond debt.

9 Paydown saves the estate approximately three million
10 dollars a month in interest that we're currently paying to AFI.
11 And if it turns out that the junior secured bonds are, in fact,
12 oversecured and accruing interest, there would be another seven
13 million dollars in savings per month as a result of the 800
14 million dollar paydown.

15 The motion has the support of the creditors'
16 committee, each of its members, plus the other parties to the
17 plan support agreement, including AFI. And importantly, AFI
18 did compromise on certain issues in reaching agreement here,
19 giving up what it believed were certain rights it had under the
20 intercreditor agreement and allowing the junior secured bonds
21 to be indefeasibly paid on this 800 million dollars.

22 Absent that concession by AFI, we probably would have
23 had to have been before you, something akin to what we were
24 looking for in the original motion, having a fight about what
25 the rights of the parties were under the intercreditor

1 agreement. Paying AFI saves that fight, and because we have
2 the reservation of rights, we believe all parties' rights are
3 reserved in the event the settlement is not ultimately
4 approved.

5 THE COURT: So when this was first raised, you were
6 proposing to escrow AFI's money, and now you've changed it to
7 paying it, which really goes to the objection from -- the
8 limited objection from Berkshire Hathaway. So what's the --
9 why should the funds be paid as opposed to escrowed?

10 MR. GOREN: Well, first of all, actually paying the
11 money saves us the interest expense. If the funds were
12 escrowed, we probably would have con -- I mean, at a minimum,
13 we would had to have continued to pay money into the escrow,
14 continue to preserve --

15 THE COURT: How much would the interest, between now
16 and June 26th, be with respect to the AFI amount, as opposed
17 to -- put the JSNs aside.

18 MR. GOREN: AFI would be about a million and a half
19 dollars between now and June 26th. I mean, as you noted, the
20 only objector to the motion is Berkshire Hathaway. They argue
21 it's premature. It wasn't clear to me from their objection
22 whether they were simply asking that it be deferred till the
23 26th or whether they were asking that it be deferred until
24 confirmation. I think I read it more as the latter. That
25 would be a fifteen-million-dollar cost to the estate just in

1 AFI's --

2 THE COURT: Just AFI --

3 MR. GOREN: -- AFI's interest. But even deferring the
4 two weeks costs the estate a million and a half dollars.

5 And I think it's important to note that under the
6 proposed plan, Berkshire Hathaway, who's a holder of junior
7 secured bonds, is being paid in full in cash on all of its
8 pre-petition claims, which means all interest that gets paid to
9 AFI ultimately comes out of the money that's available for
10 unsecured creditors.

11 THE COURT: They probably would like that money, I
12 suspect. They just, you know -- but I'll hear about that.

13 MR. GOREN: I'm sure they would. So because this
14 ultimately, we believe, is going to be a cost that's borne by
15 unsecured creditors, we think --

16 THE COURT: Yeah.

17 MR. GOREN: -- you know, we should really defer to
18 the --

19 THE COURT: So what's the standard that the court's
20 supposed to apply in determining whether to approve the motion?

21 MR. GOREN: I believe it's a business judgment
22 standard, Your Honor, and I believe we've more than adequately
23 met that. We submitted the declaration of Mark Puntas in
24 support of the motion, which details the business judgment
25 reasons for making the motion.

1 THE COURT: So let me ask you this. If the PSA is not
2 approved or the plan is not confirmed, what would -- and an
3 assertion that AFI's loan should be subordinated or somehow
4 otherwise recharacterized or some other form of relief, what
5 would the debtor have to do to recover the payment from AFI?

6 MR. GOREN: I mean, obviously -- I'm not sure I follow
7 the question.

8 THE COURT: Well, would you have to file an adversary
9 complaint to recover the billion plus that you're about to pay
10 to AFI, as opposed to you have an agreement from AFI that in
11 the event that either the plan support agreement is not
12 approved or the case is not confirmed, that they will deposit
13 the funds in escrow pending further order of the Court?

14 I mean, I just -- my question is what would -- if
15 those things happened, because I don't have -- the PSA is on
16 for approval in a couple of weeks, so that's why I asked how
17 much would it cost the debtors on interest between now and
18 then. It's obviously an important step, not the final step,
19 but if the PSA is approved, it's an important step. Okay.

20 MR. GOREN: The --

21 THE COURT: I'd certainly have a higher comfort level
22 about authorizing the payment to AFI if the PSA is approved,
23 but I have the motion today, not in two weeks.

24 MR. GOREN: And the parties thought about that, they
25 gave it a lot of thought, about whether we wanted to go forward

1 today or on the 26th. Ultimately, the parties -- you know,
2 both the debtors and the committee concluded --

3 THE COURT: Well --

4 MR. GOREN: -- we were --

5 THE COURT: -- you say that, but the parties
6 concluded, on very short notice, to amend the motion that was
7 before the Court. It's not like it was a well thought out plan
8 in advance, you filed the motion and it was clear to the Court
9 from the start what the relief that was being sought, namely,
10 pay the JSNs now escrow funds to AFI. So I mean, I think --
11 I'll hear the objector on this, but I don't think they're
12 prejudiced by the fact that there was very short notice of the
13 amended motion. But it's not as if this was a clearly thought
14 out in advance -- it was kind of at the last minute you
15 amended.

16 MR. GOREN: Well, I mean, it took some time to
17 finalize the amendments, but from the time we signed the PSA,
18 the contemplation was this was going to be the path forward.
19 And we did give thought as to whether it should go forward
20 before the PSA is approved, recognizing that obviously there's
21 some risk in the PSA being approved, but ultimately that
22 whatever risk exists needs to be counterbalanced against actual
23 cash that has to go out the door. And the parties assessed
24 that risk --

25 THE COURT: So let me come back to my question. Let's

1 assume the PSA is not approved and the debtor or the committee
2 decided that Ally shouldn't have that money, what would have to
3 occur? They'd have to bring an adversary proceeding against
4 Ally to cause the disgorgement of the payment or the deposit in
5 escrow of the payment?

6 MR. GOREN: I mean, if the PSA falls apart or the plan
7 falls apart at any point, the committee, or whoever is
8 authorized to bring those claims, will bring whatever claims
9 exist against Ally; this court or some appellate court will
10 rule about what Ally owes or doesn't owe. The order
11 specifically makes clear that any equitable subordination and
12 recharacterization arguments are not prejudiced by the fact
13 we've paid down, so if the Court ultimately --

14 THE COURT: It's just who has the money in the
15 meantime.

16 MR. GOREN: Yeah, so Ally's holding the money in the
17 meantime. We're not paying interest on it in the meantime, if
18 it turns out we're wrong. And if it turns out we're right,
19 that there is some claims Ally owes us for, they'll pay us
20 whatever is owed as determined by a court. So --

21 THE COURT: And in the debtor exercising its business
22 judgment, did it consider the credit risk?

23 MR. GOREN: It did, Your Honor, and as we set forth in
24 our reply, I mean, we -- you know, obviously, we're very
25 familiar with Ally and its credit position. We don't believe

1 there's any real credit risk of Ally. They've got over 100
2 million dollars in assets, approximately twenty billion dollars
3 in liquidity of -- you know, we're giving them another billion
4 dollars as a result of the paydown. We don't believe there's
5 any real credit risk. And any hypothetical risk that may
6 exist, we think is counterbalanced by real cash going out the
7 door.

8 THE COURT: All right. Let me hear from anyone else
9 in support of the motion, before I hear the objection.

10 MR. ZIDE: Stephen Zide from Kramer Levin, on behalf
11 of the committee.

12 Your Honor, we also took a very hard look at this, and
13 we ultimately came to the position that we support the full
14 paydown of AFI prior to the PSA. I think you've hit the nail
15 on the head; this is just a view of cost/benefits.

16 THE COURT: Hang on. Whoever's on the phone, you need
17 to put your phone on mute. We're picking up background noise.
18 So if you don't want to be cut off from the phone, please mute
19 your phone.

20 Go ahead, Mr. Zide.

21 MR. ZIDE: There clearly is a credit risk; I don't
22 know how real it is. The debtors -- you know, we've talked to
23 the debtors about it. They're feeling very comfortable. We
24 got very comfortable, ultimately, that the credit risk is not
25 very high, that it's a very low credit risk. But as Todd said,

1 there are very strong tangible benefits to paying down AFI
2 right now. It saves us three million dollars a month. In
3 addition, it avoided a fight with AFI on the paydown of the
4 JSNs. In addition, right now the PSA provides that we're not
5 going to pay down the JSNs if we don't pay AFI. So it's not
6 just a 1.5 million to AFI over the next two weeks, but it's
7 also deferring the JSN paydown, which is approximately six
8 million dollars a month savings, so it's another three million
9 as well. And also we insisted on a reservation of rights in
10 the order which preserved all rights of the committee or the
11 debtors to bring causes of action against AFI in the court to
12 implement an appropriate remedy. And the way we view this is
13 that there is no automatic trigger if the PSA is terminated or
14 the plan doesn't go effective. They've been paid down. We're
15 not paying them post-petition interest, but we could sue them
16 and nothing in that lawsuit is prejudiced by this payment. And
17 we support the motion.

18 THE COURT: Thank you. Anyone else wish to speak in
19 support?

20 MR. UZZI: Very briefly, Your Honor. Gerard Uzzi,
21 again, of Milbank Tweed, Hadley & McCloy, for the ad hoc
22 committee.

23 Your Honor, I just want to get a couple of things on
24 the record regarding our position. The debtors indicated that
25 we participated in negotiating the order that was filed with

1 the amended motion, and we did, Your Honor, and as a
2 consequence, we support the motion.

3 The two provisions that were important to us that's
4 different from the original motion and the order is that the
5 provision -- and it's reflected in the last proviso of
6 paragraph 3 of the order -- that the payments in order to stop
7 the accrual of interest on the junior secured notes, are paid
8 in indefeasibly, and the debtors have agreed.

9 The other thing that was important to us, Your Honor,
10 and it's reflected in paragraph 8 of the order, is that our
11 rights under the cash collateral order continue. Why that's
12 important, Your Honor, is that the debtors are paying down the
13 LOC -- the revolver is what's senior to us. The LOC is side by
14 side. We have some disputed liens on that; that's not the
15 issue that I'm concerned about. The issue is that the LOC
16 collateral is the collateral that our adequate protection liens
17 attach to. So that's mostly cash today; our adequate
18 protection liens attach to it, so that still is our cash
19 collateral. We want to make sure that our rights with respect
20 to the LOC cash collateral is preserved.

21 With those changes in the order, we've decided to
22 support the motion. Very briefly, Your Honor, Berkshire is an
23 important constituent in this case. We've coordinated with
24 them on many things, and we will continue to coordinate with
25 them. On this sole issue, Your Honor, we have advocated in the

1 past, and I think you're going to hear from us in the future as
2 well, de-risking the process. On balance, we think this
3 de-risks the process, and therefore, we're comfortable with the
4 order.

5 THE COURT: So address the issue of the credit risk of
6 paying the money to AFI, because obviously if the money is paid
7 to AFI, there's that much less money available to satisfy you
8 or your constituency or any other constituency in the case.

9 MR. UZZI: Your Honor, look, it's a very fair point.
10 And again, we had to balance a lot of things coming in here.
11 I'm probably more concerned about the credit risk of ResCap
12 than I am of Ally right now, and particularly with respect to
13 some of the positions they've taken as to what they can do with
14 cash. So yes, I agree there's a credit risk of Ally.

15 THE COURT: Well, that isn't a concern about credit
16 risk. They just disagree with you about what they can do with
17 the cash that's available.

18 MR. UZZI: Well, if they spend the cash, it's gone --
19 Ally spends the cash --

20 THE COURT: I don't want to get off on that.

21 MR. UZZI: Yeah.

22 THE COURT: I'm sorry. I just --

23 MR. UZZI: So look, we had to make a choice, Your
24 Honor. It wasn't an easy choice for us, but on balance, again,
25 somewhat thematically, in de-risking the overall process, we've

1 advocated it for --

2 THE COURT: Just so that --

3 MR. UZZI: -- the past --

4 THE COURT: Why don't you -- I think I understand what
5 you mean, but just so the record's clear, when you talk about
6 de-risking the process, explain what you mean.

7 MR. UZZI: We have a dispute over our post-petition
8 interests, Your Honor. One way to minimize the dispute, and so
9 therefore to minimize the risk, is to stop the accrual of post-
10 petition interest. One way to do that is just to pay our
11 principal. So we think that -- you know, the thing that we've
12 been concerned of for a -- well, it's really since the
13 beginning of the case, is that on day one we had no dispute
14 because there was no accrued post-petition interest. Every day
15 that goes by, the dispute increases and makes it harder to
16 litigate and makes it harder to settle. So based upon that,
17 and that issue only, Your Honor, is what's driving our
18 determination on this motion.

19 THE COURT: Thank you.

20 MR. UZZI: Thanks.

21 THE COURT: All right. Anybody else want to speak in
22 support?

23 All right. Mr. Walper, do you want to be heard?

24 MR. WALPER: Thank you, Your Honor. Thomas Walper,
25 Munger, Tolles & Olson, on behalf of Berkshire Hathaway.

1 Your Honor, we passed in the hall and you asked if I
2 would come in for a status conference yesterday, and the answer
3 is I probably would not, but I would come in for this.
4 Berkshire Hathaway takes this payment very, very seriously. I
5 think that the Court --

6 THE COURT: I can't imagine that you don't want your
7 share of the 800 million dollars.

8 MR. WALPER: Well, I appreciate the point. Berkshire
9 Hathaway has a lot of investments in --

10 THE COURT: I guess they don't care about their --

11 MR. WALPER: That --

12 THE COURT: You know, you own about what percentage of
13 the JSN?

14 MR. WALPER: Over forty percent, Your Honor.

15 THE COURT: Yeah. So somewhere like 350 million
16 dollars of this money would come to Berkshire Hathaway and --

17 MR. WALPER: That is the case --

18 THE COURT: -- they're indifferent to it right now.

19 MR. WALPER: That is the case, Your Honor. And it's
20 not on principal, because there's a lot more than 300-plus
21 million dollars that Berkshire Hathaway expects to recover
22 here.

23 Focusing in on what appears to be, sort of, the
24 principal area of tension -- and by the way, Your Honor, what
25 we would like is a continuance of this matter as to either both

1 or as to AFI --

2 THE COURT: Well, it isn't coming out of the JSN's
3 pocket if this is continued for two weeks, for example or I
4 don't -- first, let me ask you -- and I guess I had understood
5 that you wanted it adjourned until the PSA hearing. Mr. Goren,
6 I think, suggested -- wasn't sure whether it was through the
7 PSA hearing or confirmation.

8 MR. WALPER: This is what I was trying to clarify,
9 Your Honor.

10 THE COURT: Okay.

11 MR. WALPER: We would ask that the matter be
12 adjourned, either both or as to AFI, for --

13 THE COURT: Well, the motion is to pay both; it's not
14 to pay only you or, you know --

15 MR. WALPER: Right, and so I'm trying to avoid the
16 conflict of that by saying them both, Your Honor -- till such
17 time as there is a hearing with respect to the plan support
18 agreement, but also, because the examiner's report will be
19 disclosed after that hearing, a brief time after that, say a
20 week or so, so we have had an opportunity, as well, to digest
21 that report before coming back to Your Honor. That's --
22 surprise, surprise; we've been asking for that report for some
23 time, and we totally appreciate, Your Honor, that it's been --

24 THE COURT: You may not appreciate it, but we're
25 having a hearing on your motion on June 26th.

1 MR. WALPER: No, and I appreciate that it's been
2 sealed, Your Honor, and it has had important effects on this
3 case, and we acknowledge that.

4 THE COURT: You filed your motion before the PSA --
5 before an agreement on the PSA, am I right about that?

6 MR. WALPER: We filed the motion --

7 THE COURT: The motion to unseal the examiner report.

8 MR. WALPER: We filed it before we knew what it said,
9 yeah.

10 THE COURT: Okay.

11 MR. WALPER: Yes, Your Honor. But, first clarifying
12 what we're seeking with respect to the continuance as opposed
13 to confirmation as Mr. Marinuzzi had referred to.

14 Let's look for a second on what I think and Berkshire
15 thinks is one of the key issues here. And that is credit risk.
16 Now, Ally has given us its 10Q in a file --

17 THE COURT: May I ask you this?

18 MR. WALPER: Um-hum.

19 THE COURT: Is that the focus of your concern is the
20 credit risk if the money is paid to Ally new (sic)? That's
21 what I read your papers, essentially, as saying.

22 MR. WALPER: Yeah. And I think that that is correct,
23 Your Honor. And --

24 THE COURT: So let me ask you another question, then;
25 excuse me. Is the standard in my considering this motion

1 whether the debtor has satisfied the business judgment test?

2 MR. WALPER: Well, if you'll allow me to say I'm not
3 sure and then give an analogy.

4 THE COURT: Go ahead, sure.

5 MR. WALPER: Thank you. To me, something stands a bit
6 Kafkaesque and that is if Alley has agreed to pay 2.1 billion
7 dollars to the estate, why is before they pay their 2.1, we,
8 the estate, needs to pay them 1.1? To me that 1.1 that this
9 motion seeks to pay them is a bit like the debtors' assets.
10 These are the debtors' assets -- the debtor should be investing
11 its assets in high-, high-, high-grade credit.

12 THE COURT: Well, the debtor under, the U.S. Trustee
13 guidelines, is very, very restricted in what it can do with its
14 cash.

15 MR. WALPER: Exactly.

16 THE COURT: And the interest rate on the Ally debt
17 overwhelms the amount of interest the debtor would receive in
18 investing in qualified investments the money that it's holding
19 in the estate. You agree with that, I assume?

20 MR. WALPER: Well, yeah, I do. And when you say
21 swamp, I mean, it's a matter of --

22 THE COURT: It's coming out of their -- I'm pointing
23 at the unsecured creditors committee council -- it's coming out
24 of their hides, not yours.

25 MR. WALPER: Right, well, but they have alleged that

1 we are -- that the junior secured bonds are woefully
2 undersecured. And if that is the case, then we are unsecured
3 creditors, too, of course. But that being the case, this is a
4 brief period of time. There is a delta with respect to the
5 interest but it's not like the JSN delta; it's a far smaller
6 delta. But if you read the 10Q on page 108, it refers to Ally
7 as being a C credit for short-term, C credit, as it's being on
8 a watch list. This is not a U.S. Trustee-approved investment,
9 and this is very much like an investment --

10 THE COURT: But this isn't a loan that the debtor is
11 making to Ally, at least -- unless --

12 MR. WALPER: It may be.

13 THE COURT: -- unless and until they have recorded
14 subject-to-challenge perfected security interest. You agree
15 with that, right?

16 MR. WALPER: I haven't read the examiner's report; I
17 have not reviewed -- I don't know if there's any infirmity with
18 respect to this.

19 THE COURT: I mean, you certainly have, I'm sure that
20 you or your colleagues have examined the underlying
21 documentation to make -- given the large stake that your client
22 has -- to determine whether Ally on the face of it appears to
23 have a perfected security interest for the amount of its claim.

24 MR. WALPER: Well, this Court has entered an order
25 approving the use of cash collateral and the like which does

1 endorse those, that is correct.

2 THE COURT: Well, and -- but it was -- it may have
3 bound the debtor as to the validity perfection of the lien. It
4 didn't bind the committee. So the committee is still free to
5 challenge validity perfection amount of the AFI lien but at
6 least on -- I mean, the debtor reached its stipulation. I
7 don't believe there as a challenge to it when that came on.

8 Let me come back to the question that I asked, and I
9 don't think you've really answered my question.

10 MR. WALPER: Okay.

11 THE COURT: Okay? The only -- and I'll put it this
12 way -- the only standard I know that I'm supposed to apply in
13 determining whether to approve this motion is the business
14 judgment standard. The issue to me is has the debtor
15 appropriately exercised its business judgment in the relief
16 that it's seeking? Namely, payment to the JSNs, for which over
17 300 million will come to your client; and the payment, subject
18 to all the reservations of rights to AFI. So is the standard
19 in your view different than the business judgment standard?

20 And if so, what is it and where is your authori --
21 because your -- mercifully, your limited objection was fairly
22 short. I got the point; I understand your concerns.

23 MR. WALPER: Okay.

24 THE COURT: But you didn't cite any authority for what
25 the standard is the Court's supposed to apply in deciding

1 whether to approve the pending motion.

2 MR. WALPER: Well, and that is correct. And there was
3 really only two days' notice and the like. But, that's fine.

4 THE COURT: Well, but, come on. But -- are you
5 telling me you didn't have a -- if -- I'm very sensitive to the
6 notion of it was changed -- the form of the relief they were
7 seeking was changed at the last minute. I mean, are you saying
8 you haven't had enough time to consider the motion?

9 MR. WALPER: No, I'm not saying that, Your Honor,

10 THE COURT: Okay. I --

11 MR. WALPER: Absolutely not. And I'm not trying to
12 deflect your question at all, Your Honor.

13 THE COURT: Okay.

14 MR. WALPER: It's a very --

15 THE COURT: Well --

16 MR. WALPER: -- it's an appropriate --

17 THE COURT: That's okay.

18 MR. WALPER: It's an appropriate question. But I have
19 no authority or experience that would say that a decision such
20 as this would be anything other than the debtors' business
21 judgment. But that being the case, this is an important use of
22 the debtors' assets. And it is -- what it's doing here is,
23 yes, paying back a secured claim to a party who has allegedly
24 dominated and controlled it, who against which it has
25 significant fraudulent conveyance claims and other claims, and

1 to which party has already agreed to pay 2.1 billion dollars
2 pursuant to a PSA to be approved back to ResCap. And that to
3 me, I think, raises some issues perhaps with respect to
4 business judgment, prudence or whatever.

5 THE COURT: Can I ask this? Do you wish to cross-
6 examine any of the debtors' witnesses with respect to their
7 decision to exercise their business judgment in this fashion?
8 I mean, one of the things -- and I looked at the pay and I
9 realize you all only had a short time to respond. You did, you
10 filed your limited objection. If you tell me you think
11 you're -- you want to cross-examine, we'll get a witness.

12 MR. WALPER: Well, Your Honor --

13 THE COURT: You didn't really raise -- I mean, I
14 understand your concern. You raised the issue principally with
15 respect to the credit risk they're paying this money back now.
16 And the response said yeah, but we're paying a lot of interest
17 which is coming out of the hide of the unsecured creditors in
18 the meantime. And that may be your client, as well.

19 MR. WALPER: Right. And -- but I would submit there
20 is sufficient evidence in the record. I'm not saying that
21 cross-examine might not -- wouldn't be appropriate, but there
22 is evidence in the record. And that is that counsel has not
23 indicated that this is subject to disgorgement; it just says
24 there's a reservation of rights. And as the court
25 appropriately questioned, does this mean you'd have to file an

1 adversary proceeding to get back the money when they owe you
2 money? And the answer was yes, I believe.

3 THE COURT: I never got a real answer, but that's --

4 MR. WALPER: I think the answer is yes and that is one
5 of the concerns. One of the concerns is there may be
6 significant regulatory hurdles for Ally to pay this money back.
7 Maybe they have to get regulatory approval to pay it back even
8 with Court order. They may appeal any ruling of this Court
9 with respect to disgorgement. You could conceive of this
10 costing millions and millions and millions of dollars. It
11 would be worth that investment because it's 1.1 --

12 THE COURT: Let me just try -- I want to -- do you
13 wish to cross-examine a witness or are we resting on the papers
14 that I have in front of me?

15 MR. WALPER: If I could have a brief recess, I'd be
16 delighted to cross-examine Mr. Puntus.

17 THE COURT: Who do you wish to examine? I mean, I'm
18 just -- look, you filed your limited objection. It didn't seem
19 to me that there really are disputed factual issues. You
20 dispute the conclusion that the debtor reached, namely that
21 this was an exercise of business judgment in seeking that
22 relief. But that's why I want to know, are you requesting the
23 opportunity to cross-examine a witness from the debtor on the
24 issue? Which seems to me the only issue that would be
25 pertinent to it is the exercise of business judgment.

1 MR. WALPER: I apologize for the pause, Your Honor. I
2 do believe that there is sufficient record in light of the fact
3 that what we're seeking, really, here is a brief continuance,
4 so other factual developments can be understood.

5 THE COURT: That's not what you asked for. The
6 factual development you asked -- you wanted the Court to at
7 least wait until the PSA hearing and the examiner report --

8 MR. WALPER: that's correct.

9 THE COURT: -- being done. The examiner report is
10 hearsay no matter what.

11 MR. WALPER: Okay.

12 THE COURT: The last I looked at --

13 MR. WALPER: I would agree, Your Honor, yes.

14 THE COURT: -- an issue like that, it would be
15 hearsay. Important, no doubt, important. Do you wish to
16 cross-examine a witness of the debtor on the exercise of
17 business judgment in their motion to pay this money?

18 MR. WALPER: Yes, Your Honor.

19 THE COURT: Okay. We will -- let's finish this
20 agenda. We'll see what time we finish and the debtor can call
21 a witness and we'll do it right now.

22 MR. WALPER: Thank you very much.

23 THE COURT: Okay.

24 MR. WALPER: I appreciate it.

25 THE COURT: Anybody else wish to be heard with respect

1 to the pending motion?

2 Go ahead, Mr. Goren.

3 MR. GOREN: Your Honor, we have Mr. Puntus here. I
4 only rise -- and he's available, happy to -- we'll speak with
5 him. But I just rose now to just clarify one thing which is
6 that there actually was no stipulations in the original cash
7 collateral order as to AFI. We stipulated only to the
8 junior --

9 THE COURT: All right. Thank you very much for
10 clarifying that.

11 MR. GOREN: Just wanted to clarify.

12 THE COURT: Okay. Mr. Schrock?

13 MR. SCHROCK: Good morning, Your Honor; Ray Schrock of
14 Kirkland & Ellis on behalf of AFI and Ally Bank.

15 Your Honor, I'm going to reserve -- may I reserve
16 comments until after cross? But I would like to address some
17 of the points that counsel raised at the podium.

18 THE COURT: Well, no, I want to hear from you now. I
19 mean, you can speak again --

20 MR. SCHROCK: Okay.

21 THE COURT: -- after cross-examination.

22 MR. SCHROCK: Okay.

23 Your Honor, Berkshire Hathaway has raised an alleged
24 issue: credit risk. They have not submitted any evidence in
25 support of their objection. They want the estate and unsecured

1 creditors to take on a further cost when there's been a largely
2 very-consensual Chapter 11 plan and global settlement reached.
3 The debtors --

4 THE COURT: Not yet approved by the Court.

5 MR. SCHROCK: Not yet approved by the Court, Your
6 Honor, but nevertheless, Your Honor, there is an intercreditor
7 agreement that's in place with -- that governs Berkshire
8 Hathaway's debt. Our insistence all along has been that the
9 terms of that intercreditor must be honored. And we certainly
10 very much insist on that.

11 THE COURT: Yeah, I'm not deciding the issue at the
12 moment, but it certainly appears to me with respect to this
13 motion that unless I heard a lot more argument, evidence and
14 briefed authority, that I can't approve the repayment to the
15 JSNs without the payment to AFI. Somebody would have to make a
16 showing that hasn't been made to me so far so that if the JSNs
17 want their money now, the cost of it is the repayment to AFI.
18 At least on the present set of papers in front of me, that's
19 the relief that's being sought; not pay just the JSNs, don't
20 pay AFI. That doesn't mean that the Court should grant the
21 motion. Just that's what I understand.

22 So, I mean, I don't know that you have to -- I
23 understand your position. It's consistent with at least the
24 relief that's being sought by the debtor at this time.

25 MR. SCHROCK: Okay, very good, Your Honor. We just

1 wanted to make sure that was clear.

2 THE COURT: Okay.

3 MR. SCHROCK: Also, Your Honor, we don't think there's
4 any question, and we think the further evidence and cross of
5 the witness will support that the debtor has satisfied business
6 judgment standards. We do take serious issue with somebody
7 saying that Ally is a credit risk. Ally has access to the
8 capital markets; Ally has well ov -- in excess of a hundred
9 billion dollars in assets; Ally has access to several -- in
10 excess of twenty billion in liquidity; it has an access to
11 capital markets as recently as just a couple months ago; it has
12 access to capital markets during the case. Berkshire Hathaway
13 has found it appropriate to invest in Ally through depositions.

14 So, Your Honor, we think it's a real cost-savings
15 issue for the estate. Parties are trying to save money so that
16 their -- we can start pushing money out of the estate,
17 hopefully, in connection with the confirmed plan that's before
18 the Court. But this type of relief, to pay off secured
19 creditors, to de-risk the case, it's meaningful. This is real
20 money, real recoveries.

21 THE COURT: I'm very mindful of that. It's --

22 MR. SCHROCK: Okay. That's all I have, Your Honor.

23 THE COURT: Thank you, Mr. Schrock.

24 Does anybody else wish to be heard?

25 All right, let's move on with the agenda and then

1 somebody from the debtor ought to be -- I don't know if you
2 want to excuse yourself to go prepare your witness, go ahead
3 and do that because my thought is we're going to move forward
4 promptly with that. Okay?

5 MR. GOREN: We'll be ready, Your Honor.

6 THE COURT: Okay.

7 MS. RICHARDS: Your Honor, for the record again, Erica
8 Richards of Morrison & Foerster appearing on behalf of the
9 debtors.

10 That takes us, I think, to a much more straightforward
11 matter for the Court's consideration. It begins on the top of
12 page 25 of the agenda. That's the debtors' motion seeking to
13 enforce the stay against Marcia Navarro and her counsel at
14 docket number 3830.

15 THE COURT: Okay. Is anybody here for the Navarros?

16 MS. APONTE: Yes; Rosy Aponte on behalf of Navarro.

17 THE COURT: All right. May I -- just tell me your
18 name again.

19 MS. APONTE: Rosy Aponte.

20 THE COURT: Okay. All right, Ms. Richards, go ahead
21 and argue your motion and I'll give them a chance to respond.

22 MS. RICHARDS: Your Honor, I would also note that Glen
23 Glover from Bradley Arant Boult Cummings who is GMAC Mortgages'
24 co-counsel in the underlying state matter is also present
25 telephonically.

1 Your Honor, we think this matter is a straightforward
2 stay violation.

3 THE COURT: Well, I don't.

4 MS. RICHARDS: Okay.

5 THE COURT: So let me just ask you some questions,
6 okay? First off, is GMAC seeking to vacate the Florida
7 judgment? Doing anything to vacate the Florida judgment? I
8 mean, somebody was asleep at the switch. Somebody shows up at
9 a hearing after the bankruptcy's filing, doesn't tell the state
10 court judge in Florida that there's been a bankruptcy and they
11 go ahead and enter a judgment for attorneys' fees.

12 MS. RICHARDS: That's true, Your Honor. And by way of
13 explanation, if you look at the record in the court pleadings,
14 the foreclosure matter was dismissed in April 2011. The week
15 after, Navarro's counsel filed the motion for attorneys' fees
16 and did nothing with it for over a year. In the intervening
17 period, GMAC Mortgage ceased using the counsel who'd been
18 handling the underlying foreclosure matter. So the file was
19 dormant. By the time the application was filed and they
20 retained additional counsel, I agree, there was a gap --

21 THE COURT: Is the debtor doing anything in Florida
22 state court to seek to vacate the judgment for attorneys' fees?
23 It's 25,870 dollars.

24 MS. RICHARDS: They are, Your Honor. They filed --

25 THE COURT: And what's the status?

1 MS. RICHARDS: -- a motion to vacate. There is a
2 hearing scheduled tomorrow before the state court. I
3 understand --

4 THE COURT: The trial court that entered the judgment?

5 MS. RICHARDS: Correct. I think the Miami-Dade
6 Circuit Court in Florida.

7 THE COURT: Okay.

8 MS. RICHARDS: I think GMAC Mortgage -- and Mr. Glover
9 can correct me if I'm wrong -- GMAC Mortgage is seeking to
10 vacate those fees. In addition, the Navarros have filed a
11 motion for sanctions against GMAC Mortgage and their counsel on
12 the grounds that the bankruptcy state was inapplicable and the
13 notice was improperly filed. That's also scheduled for hearing
14 tomorrow.

15 THE COURT: So look -- and I had this vague
16 recollection and I asked one of my law clerks to look at it and
17 it didn't -- I'll tell you what we found. In a prior matter in
18 this case involving the Donaghys, D-O-N-A-G-H-Y, Michael and
19 Stephanie Donaghy; on January 8th, 2013, I granted the
20 Donaghys' motion for relief from the automatic stay and the
21 order which is ECF docket number 2579 in paragraph 2, "To the
22 extent applicable, the automatic stay of Bankruptcy Code
23 Section 362 is limited for the limited purpose of permitting
24 the Donaghys to pursue in the New Jersey Bankruptcy Court
25 sanctions against GMAC Mortgage for conduct occurring on or

1 after the petition date of May 14th, 2012 by or on behalf of
2 GMAC Mortgage in connection with the Donaghys' loan or their
3 pending Chapter 13 bankruptcy case."

4 So the gist of that was, I think it was Judge Wizmur
5 in the Bankruptcy Court -- there was a real question about the
6 conduct of GMAC in connection with the Donaghys' bankruptcy
7 case. It's a little different than this but somebody's asleep
8 at the switch. They don't tell the Court in Florida that
9 there's a bankruptcy filed. The Navarros, at least, claim they
10 didn't have notice of it, either, at the time. Whether they
11 did or not, I don't know, okay. The questions that I have are,
12 is it implicit in the supplemental servicing order that if a
13 debtor is unsuccessful in a state foreclosure action, that the
14 state court may order payment of fees if state law so provides?

15 So the thing about the Donaghy case -- that I have to
16 go back to look at a transcript but I remember raising this
17 subject during the argument -- was, fine, you got a
18 supplemental servicing order, it allows for you to go forward
19 with foreclosure proceedings. And then when you do something
20 that leads a court not to enter a damage award because there's
21 a wrongful foreclosure, but because there's something you did
22 in the foreclosure proceeding that leads a court to say wither
23 the prevailing party under state law recovers attorneys' fees
24 or they're entitled to sanctions against you, for you to come
25 and tell me that no, Judge, the automatic stay applies, the

1 Donaghys can incur 25,000 dollars in legal fees for wrongful --
2 and I'm not saying this is -- hypothetically -- that for
3 wrongful foreclosure, and the state court is powerless --
4 Judge, you said they could go ahead with the foreclosure, but
5 the state court is powerless to enforce sanctions, attorneys'
6 fees. That's what's bothering me, okay?

7 Look, the court entered a judgment after the automatic
8 stay. It is not crystal clear from the supplemental servicing
9 order -- I don't know whether -- was the supplemental servicing
10 order entered on the date that the judgment for attorneys' fees
11 was entered?

12 MS. RICHARDS: I think --

13 MS. APONTE: Yes.

14 MS. RICHARDS: The final supplemental servicing order
15 had been entered, I think, as of that date.

16 THE COURT: But it's not, I have to tell you, it's
17 not -- it's certainly not explicit in there that the state
18 court could award attorneys' fees. But just as the Donaghy
19 matter came before me, I wasn't about to say that I'm going to
20 decide this issue. The judge that has the case should decide
21 the issue. So here's what I'm going to -- I'll hear from the
22 Navarro's counsel -- the motion to vacate is being heard
23 tomorrow?

24 MS. RICHARDS: I have to defer to Ms. Aponte --

25 MS. APONTE: No, Your Honor. The motion to enforce

1 the stay is being heard tomorrow. There is no motion to vacate
2 judgment; it's a motion to enforce the stay.

3 THE COURT: Okay.

4 MR. GLOVER: Your Honor, this is Glenn Glover from
5 Bradley Arant. It's actually -- there is not motion to enforce
6 the stay that's been filed by GMAC. There was a motion for
7 sanctions, motion to strike misleading, frivolous and
8 disparaging filing a motion for sanctions that was filed by
9 GMAC. It's my understanding that that is not on the docket
10 tomorrow.

11 What is on the docket, as evidenced by a notice of
12 hearing, is Ms. Navarro's amended motion for sanctions and to
13 hold GMAC, an individual attorney from the Albertelli law firm
14 and the law firm itself, in contempt for filing -- for simply
15 filing an inapplicable notice of bankruptcy stay which was
16 filed, I believe, in mid-March of 2013. And just to clarify
17 that for the record. That's, according to my understanding,
18 that's the only thing, the only motion, that is set for hearing
19 tomorrow in the state court.

20 THE COURT: Mr. Glover, tell us --

21 MS. APONTE: Well, we also filed --

22 THE COURT: Stop --

23 MS. APONTE: -- Your Honor, a motion to stay the
24 proceedings until you clarified this order. We didn't -- only
25 filed that motion. We didn't realize that the hearing was

1 going to be held before this June 13 hearing. I had set that
2 hearing before this one. SO it's also a motion to stay the
3 proceedings until Your Honor clarifies the interim relief and
4 whether the state does apply or not.

5 THE COURT: All right.

6 MR. GLOVER: Your Honor --

7 THE COURT: Mr. Glover, stop --

8 MR. GLOVER: -- Glenn Glover again. It's my
9 understanding that that is -- I'm not sure this makes much of a
10 difference -- but that is that they did not file a motion
11 seeking that relief, but they actually submitted an ame -- a
12 proposed order.

13 THE COURT: Mr. Glover.

14 MR. GLOVER: And that proposed order did state that
15 they would --

16 THE COURT: This is why I don't like telephone
17 hearings.

18 MR. GLOVER: -- I think it was in the last paragraph,
19 paragraph 8 of that proposed order, that they would stand down
20 against GMAC and GMAC only --

21 THE COURT: Okay, Mr. --

22 MR. GLOVER: -- with respect to any further
23 proceedings until the Bankruptcy Court ruled.

24 THE COURT: All right. Mr. Glover, don't say another
25 word until I tell you to. I've been trying to cut in and ask a

1 question. It's the problem with telephone hearings; I'm not
2 faulting you for it, but I don't want to hear from either
3 counsel on the phone until I finish what I have to say.

4 Okay, I'm going to ask Mr. Glover some questions and
5 I'd like some answers.

6 Mr. Glover, has GMAC filed a motion in state court to
7 vacate the judgment for attorneys' fees that was entered?
8 Could you answer that for me?

9 MR. GLOVER: Your Honor, I can. If you give me one
10 second, I've got the docket in front of me.

11 MS. RICHARDS: Your Honor, the motion to vacate was
12 Exhibit --

13 MR. GLOVER: Yeah, I --

14 MS. RICHARDS: -- 4H to our motion; excuse me.

15 THE COURT: Ms. Martin, go ahead -- Ms. Richards; I'm
16 sorry. I apologize.

17 MS. RICHARDS: No problem. The debtors did file a
18 motion to vacate. It was attached as Exhibit 4H to our motion.

19 THE COURT: When is that going to be heard?

20 MS. RICHARDS: It has not been scheduled for a hearing
21 yet.

22 THE COURT: Okay. What I would like to do -- let
23 me -- does Navarro's counsel want to be heard? Go ahead.

24 MS. APONTE: Yes, Your Honor. It's our position that
25 in your order filed July 13th, 2012, docket entry 774, the

1 final supplemental order, it states that there's an exception
2 to the stay. And it clearly states that that exception is
3 "except when a monetary claim of must be pled in order for an
4 interested party to assert a claim to defend against or
5 otherwise enjoin or preclude a foreclosure, each a mandatory
6 monetary claim."

7 I also cited in my motion, Your Honor, case law that's
8 right on point, which says that -- it's my position that in
9 this case the debtor's trying to use the interim relief as a
10 sword and a shield. They ask to be granted the leave to go
11 ahead with these foreclosure actions, and that's part of the
12 interim relief. And now, they're saying well, if we prosecute
13 and we win, we're entitled to attorneys' fees. But if we lose
14 for wrongful foreclosure or otherwise, then they're not
15 entitled to fees. And they cannot have it both ways, Your
16 Honor.

17 If It's either -- if they're going to pursue these
18 prosec -- prosecuted prosecuting these foreclosure claims, then
19 the prevailing party is entitled to attorneys' fees. Another
20 issue is that under 57105 of Florida law these attorneys' fees,
21 half of them are -- the attorneys are responsible for it. So
22 the 25,000 and plus judgment, half of it would be the debtor,
23 and the other half would be the attorneys that are responsible
24 for paying that claim.

25 And the attorneys are not part of this bankruptcy, so

1 their portion is not -- should not be stayed in the proceedings
2 even if Your Honor were to decide that it is. Again -- and
3 there's -- in your order, you stated that any direct claims or
4 counterclaims are part of the automatic stay. But this was not
5 a direct claim or a counterclaim. It was a defense to a
6 foreclosure, where GMAC is the one prosecuting the claim, which
7 is they asked and received relief for. And now, they're saying
8 well, you granted us to leave to prosecute the foreclosure
9 claim. But if they prevail, then they shouldn't be entitled to
10 fees. And I don't think that that -- that they should be able
11 to use the interim relief order as a sword and a shield.

12 And there's case law on point. There's In re Ilazra
13 (ph.), which was a case decided by the Ninth Circuit in 2005,
14 which says "Even if a cause of action arose pre-petition, the
15 discharged shield cannot be used as a sword that enables a
16 debtor to undertake risk free litigation at others' expense."
17 It says, "In light of the foregoing discussion, we reaffirm
18 that claims for attorneys' fees and costs incurred pre or post-
19 petition, the debtor voluntarily commences litigation or
20 otherwise voluntarily returns to the fray of the stayed action,
21 then they're exposing themselves to having to pay
22 attorneys'" --

23 THE COURT: All right.

24 MS. APONTE: -- "fees if they lose."

25 THE COURT: All right, stop. I don't want to hear

1 anymore. All right. Here's the Court's determination.

2 MS. RICHARDS: Your Honor, I would like the
3 opportunity to respond to your questions in a few --

4 THE COURT: Go ahead, quickly.

5 MS. RICHARDS: -- points. The purpose of the
6 supplemental servicing order was to allow the debtors to
7 continue servicing post-petition. The foreclosure action was
8 dismissed more than a year before the debtors filed. Both
9 Navarro and her counsel received notice of the bar date order
10 and didn't file a proof of claim. We are not seeking to forbid
11 people from getting attorneys' fees when the debtors wrongfully
12 foreclose.

13 Here -- everything here happened pre-petition, and the
14 Navarro's counselor are now seeking to get paid ahead of every
15 similarly situated creditor.

16 THE COURT: Okay. I -- I don't want to hear anymore
17 argument. The Court's determination is the following.

18 The supplemental servicing order lifts the automatic
19 stay with respect to the debtors' prosecution of state
20 foreclosure actions. And in doing so, the debtor also subjects
21 itself to sanctions or attorneys' fees when available and
22 awarded under applicable state law. Therefore, the automatic
23 stay did not apply and bar or prevent the entry of the judgment
24 ordering an award of attorneys' fees in the amount of 25,870
25 dollars. However, because the attorneys' fees were based on

1 pre-petition conduct, the judgment is a pre-petition general
2 unsecured claim. It's unclear to me whether the debtor was
3 given proper notice of the filing of the case when the debtors'
4 lawyer showed up in the bankruptcy court -- showed up in the
5 state court after judgment -- after the bankruptcy was filed,
6 didn't even disclose that fact to the state court judge.

7 Whether the Navarros -- the stay clearly does apply to
8 any effort by the Navarros to collect on the judgment. And if
9 they wish to seek to collect on that judgment, they're going to
10 have to file a motion for filing of a late claim. And while
11 the standard is a difficult one for filing of a late claim, to
12 me, frankly, the debtor invited this through its failure to
13 disclose to the state court that there was a bankruptcy that
14 was in place.

15 So for today, what I'm deciding is, is that the
16 automatic stay does not apply, did not apply to the entry of
17 the judgment for attorney's fees awarded in the state court
18 foreclosure action in Florida. It certainly was -- it appears
19 to have been awarded based on a prevailing party rule in
20 Florida. The debtor was unsuccessful; hence the judgment for
21 attorneys' fees was entered. But it was based on pre-petition
22 conduct, and it would be a pre-petition claim. For now, what
23 that judgment does is fix the amount of a potential claim. The
24 Navarros' lawyer is going to have to file a motion for leave to
25 file a late claim, which I will -- if you can't resolve this

1 matter, Ms. Richards, I will consider the motion when it comes.

2 So they can -- in -- put it this way, in my view,
3 based on my ruling, there is no basis, as a result of the
4 automatic stay, for the state court judgment to be vacated. If
5 there are independent state court grounds for doing so, I leave
6 that to the court in Florida. I thought I made this clear at
7 the time of the Donaghy matter. You came into this case -- the
8 debtor came into this case saying it wanted to conduct business
9 as usual. And it wanted the ability to continue to bring state
10 court foreclosure actions, and that was fine. And that's what
11 the supplemental servicing order permits.

12 It doesn't permit borrowers to bring damages actions
13 against the debtor. They'd have to do that through a proof of
14 claim in this court. But when you bring a foreclosure action
15 or continue a foreclosure action and the conduct would subject
16 the debtor to sanctions and/or the award of attorneys' fees
17 under applicable state law, that's the risk the debtor bears in
18 conducting business as usual. That's going to be the Court's
19 ruling.

20 MS. APONTE: Your Honor?

21 THE COURT: And an order will be entered denying the
22 motion, which is at ECF 3830, for the reasons stated on the
23 record.

24 All right. Let's move on, on the agenda.

25 MS. RICHARDS: Thank you, Your Honor.

1 THE COURT: Counsel on the phone on the matter, if you
2 want to be excused, you can be, or you're welcome to stay on.

3 Mr. Newtown --

4 MS. APONTE: I'll be excused. Thank you, Your Honor.

5 THE COURT: Okay, thank you.

6 MR. NEWTON: Good morning, Your Honor. James Newton
7 of Morrison & Foerster, on behalf of the debtors. The next
8 couple of matters relate to motions filed by Julio Solano. The
9 first one is a motion for permission to extend the deadline for
10 Julio Solano to file a proof of claim. It's docket number
11 2935. And the -- I apologize. I think I got them in the wrong
12 order. There's also a relief from stay motion filed by Mr.
13 Solano.

14 I'm happy to let the Court know that, I believe, as of
15 this morning, we have reached an agreement with Mr. Solano.
16 His counsel, I believe, Mr. Sax is on the phone. And with your
17 permission, I reflect the agreement, and we'll follow it up --

18 THE COURT: Let me just confirm --

19 MR. NEWTON: -- with --

20 THE COURT: -- Mr. Sax, are you on the phone?

21 MR. SAX: Yes, I am, Your Honor.

22 THE COURT: All right. Go ahead, Mr. Newton.

23 MR. SAX: Can you hear me?

24 THE COURT: Yes, I can. We'll let the debtors'
25 proceed, and then I'll give you a chance to speak, okay?

1 MR. SAX: Yes, Your Honor.

2 THE COURT: All right, thank you. Go ahead.

3 MR. NEWTON: Mr. Solano has agreed that he will
4 withdraw the motion to file a late proof of claim and also
5 dismiss the adversary proceeding that he has pending seeking a
6 determination of dischargability of any debt that the debtors
7 owe to him. And the debtors will, in turn, stipulate to relief
8 from the automatic stay so that Mr. Solano can pursue the
9 equitable claims that he seeks to pursue in the state court,
10 but not with regards to monetary claims that he is asserting
11 against the debtors.

12 So that would permit Mr. Solano to pursue his request
13 to unwind the foreclosure sale -- or avoid the foreclosure
14 sale.

15 THE COURT: What -- the house was sold in foreclosure?

16 MR. NEWTON: The house was sold --

17 THE COURT: Was it a private buyer or --

18 MR. NEWTON: It was purchased by the bank, so it's
19 being held in real estate owned, currently.

20 THE COURT: All right. Mr. Sax, do you want to be
21 heard?

22 MR. SAX: I agree that Mr. Newton set forth our
23 agreement, Your Honor.

24 THE COURT: Okay. So are you going to put it in the
25 form of a stipulation?

1 MR. NEWTON: We will.

2 THE COURT: All right. Thank you very much. Thank
3 you, Mr. Sax. Thank you, Mr. Newton.

4 MR. SAX: Thank you.

5 MR. NEWTON: I'll turn the podium over to Norm
6 Rosenbaum for the --

7 THE COURT: Okay.

8 MR. NEWTON: -- next matter.

9 MR. ROSENBAUM: Good morning, Your Honor. Norm
10 Rosenbaum, Morrison & Foerster. Your Honor, the next matter on
11 is a motion filed by Donna Chinloy. It's in the form of a
12 letter that was put for hearing to extend the deadline for
13 filing a proof of claim. I don't know if Ms. Chinloy, who I
14 believe is appearing pro se, has made an appearance.

15 THE COURT: Ms. Chinloy, are you on the phone? Let me
16 just check the -- all right, I've examined the telephone
17 appearance list, and I do not Ms. Chinloy on the list.

18 I will take the matter under submission and enter a
19 written order.

20 MR. ROSENBAUM: Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Rosenbaum.

22 MR. ROSENBAUM: Your Honor, that brings us to the
23 first interim application of Pepper Hamilton as special counsel
24 for the foreclosure review. I'm advised by the U.S. trustee,
25 Mr. Masumoto, will confirm that they've settled. And I'm not

1 sure the terms of the settlement, but hopefully from Pepper
2 Hamilton or the U.S. trustee's office can describe it for the
3 Court.

4 THE COURT: All right. Mr. Masumoto?

5 MR. MASUMOTO: If I may, Your Honor?

6 THE COURT: Yes, go ahead.

7 MR. MASUMOTO: Good morning, Your Honor. Brian
8 Masumoto for the Office of the United States Trustee. I
9 believe counsel for --

10 THE COURT: Let me ju -- before you -- is somebody for
11 Pepper Hamilton on the phone?

12 MR. MASUMOTO: I believe --

13 MS. KOVSKY-APAP: Your Honor, this is Deborah Kovsky-
14 Apap with Pepper Hamilton.

15 THE COURT: All right, thank you. Go ahead, Mr.
16 Masumoto.

17 MR. MASUMOTO: Your Honor, the parties have conferred
18 and reached an agreement with respect to the vague time entry
19 objection that the U.S. trustee filed. Based upon the
20 submissions and the consultation with the applicant, we've
21 withdrawn that objection.

22 With respect to the objections to expenses, the
23 parties have agreed that the applicant will reduce their
24 expenses by 1,500 dollars with respect to meal charges over the
25 20 dollar limit.

1 And that resolves all of our issues.

2 THE COURT: All right. Anybody else wish to be heard
3 with respect to the Pepper Hamilton first interim fee
4 application?

5 All right. The Court has reviewed the fee
6 application. It also reviewed the records which were submitted
7 in camera for the Court's review. It reviewed the U.S.
8 trustee's objection and now the resolution that the U.S.
9 trustee has reached with Pepper Hamilton. On that basis, the
10 Court approves the first interim app -- fee application to
11 Pepper Hamilton with the adjustment that's been agreed upon
12 with the U.S. trustee.

13 MR. MASUMOTO: Thank you, Your Honor.

14 THE COURT: Thank you very much, Mr. Masumoto.

15 MS. KOVSKY-APAP: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 MR. ROSENBAUM: Your Honor, next, we get to cure
18 objections on the agenda. I think, suffice it to say, the
19 debtors are working through the cure objections in an effort to
20 try to resolve them. And we're pretty close to resolving all
21 of them. So the ones that haven't been resolved, we're
22 adjourning to the July 10th hearing. And the ones that are
23 resolved, we're settling within -- in consultation with the
24 committee. Thank you.

25 THE COURT: All right.

1 MR. ROSENBAUM: Your Honor, that brings us to the
2 adversary proceedings that begin at the bottom of page 31. I'm
3 going to cede the podium to James Newton.

4 THE COURT: On the copy of the agenda that I was
5 handed just before the hearing, it's on page 32, but --

6 MR. NEWTON: That's my agenda as well. Your Honor,
7 James Newton of Morrison & Foerster, again, on behalf of the
8 debtors. The first adversary proceeding matter is the Jenkins
9 v. Residential Funding Company, LLC, et al. adversary. It's
10 number 12-01935.

11 Your Honor may recall that the Court previously
12 granted the debtors' Rule 12(e) motion for a definite
13 statement. And we were last here on May 14th, shortly before
14 the deadline for plaintiffs to file an amended complaint.
15 Since then, Your Honor, the Jenkins have filed a complaint. It
16 was the -- as far as I could tell, the exact same complaint
17 that was filed previously.

18 THE COURT: So let me -- if I remember correctly, I
19 think it's this case. What -- is anyone from the Jenkins on
20 the phone?

21 MS. JENKINS: Yes.

22 THE COURT: Okay. I --

23 MS. JENKINS: Can you hear me?

24 THE COURT: Yes, I can. I think the last time that we
25 had a hearing in the case, you were trying to find counsel.

1 And I don't --

2 MS. JENKINS: Yes, sir.

3 THE COURT: -- remember -- I think someone -- they
4 hadn't appeared yet, but they were on the phone. Am I -- Mr.
5 Newton, am I correct about that?

6 MR. NEWTON: They weren't on the phone, but we had
7 spoken to someone who was --

8 THE COURT: Yeah.

9 MR. NEWTON: -- assisting the Jenkins.

10 THE COURT: And Mrs. Jenkins, I gather you were
11 unsuccessful in getting counsel?

12 MS. JENKINS: Yes, sir.

13 THE COURT: Okay.

14 MS. JENKINS: May I read a statement, if you -- if it
15 please Your Honor?

16 THE COURT: Sure, go ahead.

17 MS. JENKINS: I'll just from the beginning.

18 THE COURT: Okay.

19 MS. JENKINS: We would like to make the following
20 statement for the consideration of the Court, and we are not
21 sure that all of this is relevant. But we pray that you will
22 allow it. We have been in contact with attorney Marv Brenner
23 (ph.), and he has agreed to communicate with Silverman Acampora
24 and others on a very limited basis. Attorney Brenner has not
25 agreed to formerly represent us for various reasons. He has

1 been the only counsel that has agreed to do anything as of this
2 date.

3 It is very evident that we need legal counsel, and we
4 are still trying to accomplish that. It appears to be a money
5 issue, just point blank, plain and simple, which we thoroughly
6 understand. Lawyers are saying that we need 20,000 dollars
7 upward to retain them, and we are -- and they are either out of
8 district, or we are out of district, or they are not admitted
9 in your district. And we have gone through legal aid in a --
10 New York and in Atlanta, where we live. We do not want to lose
11 our home, Your Honor, when there are clearly, clearly rules,
12 regulations and errors made by our servicer and others who are
13 processing our mortgage document by our loan and the loan
14 modification.

15 And we just absolutely had no control over it. We
16 feel they should be held accountable for these inconsistencies
17 and/or errors, which we have identified in our amendment,
18 including our -- the hardship that it has caused us. We have
19 spent many thousands of dollars already on foreclosure
20 attorneys, fighting foreclosure, while actually paying our
21 mortgage at the same time through several different trial
22 payment periods. This has only prolonged and aggravated the
23 issue, which we want to resolve and not prolong issues made by
24 the U.S. Residential Funding, GMAC and others that were
25 accountable.

1 I just have a little bit more to go, if you will, Your
2 Honor.

3 THE COURT: Go ahead.

4 MS. JENKINS: It appears that some of our mortgage
5 documents may be fraudulent, and we would like to find out for
6 sure. The only avenue we have right now is through this
7 complaint in your court. We have had several different owners
8 of our mortgage, doubled in with mortgage lenders and GMAC, who
9 broke -- as we understand it, has filed for bankruptcy. That
10 is why we filed the complaint and also filed as a creditor.

11 Your Honor, in the grand scheme of things, we are only
12 one very minute speck in this humongous pot. And we want to be
13 heard and justified. We are senior citizens and do not want to
14 be displaced under these circumstances, which, again, were
15 beyond our control. Your Honor, we were paying our mortgage
16 even though our resources were limited.

17 Will you grant us a motion to allow us to resolve this
18 issue by ordering them, whoever the them are -- we don't even
19 know who the them are anymore -- not to foreclose on us with --
20 along with any compensation that may be allowed. We are,
21 again, in loan -- in the loan modification process and not in
22 foreclosure at this time. We are thankful and appreciative of
23 the Court's patience and others involved while trying to get
24 these issues resolved.

25 Please support us, whatever else you can, so we may be

1 able to resolve our situation and stay in our home, Your Honor.

2 THE COURT: All right. Thank you, Mrs. Jenkins. Mr.
3 Newton?

4 MR. NEWTON: Your Honor, I just want to say that the
5 debtors certainly are not trying to prevent the Jenkins from
6 resolving any issues that they have with respect to --

7 THE COURT: Who owns the loan; do you know?

8 MR. NEWTON: I don't recall who owns the loan. I
9 believe it's in a securitization trust. The debtors are the
10 master servicer of the loan.

11 THE COURT: Is Ocwen servicing it now?

12 MR. NEWTON: No. It's America's Servicing Company,
13 and I believe counsel for America's Servicing Company is in the
14 courtroom as well.

15 But as we've stated from the beginning, we just -- we
16 don't think this is the correct place for this to be
17 proceeding. We -- as stated at the prior hearing, the -- we've
18 spoken to Mr. Brenner, who Ms. Jenkins referenced. We've
19 provided him with contact information for the primary ser --
20 the -- sorry, the servicer, America's Servicing Company, as
21 well as foreclosure counsel in Georgia. And we really believe
22 that that's the best time that the Jenkins time could spend is
23 speaking with that foreclosure counsel who will be able to
24 answer the questions and deal with any issues that the Jenkins
25 have related to the foreclosure or if there's a potential for a

1 loan modification -- for a loan modification.

2 THE COURT: Counsel for American Ser -- America's
3 Servicing?

4 MS. JENKINS: Your Honor, may I speak, please?

5 THE COURT: No, no. I'll give you another chance,
6 Mrs. Jenkins. Counsel for America's --

7 MS. JENKINS: Yes, sir.

8 THE COURT: -- Servicing is here. Go ahead. Your
9 name is?

10 MR. GRIECO: Brian Grieco from Hogan Lovells, for
11 Wells Fargo --

12 THE COURT: Go ahead.

13 MR. GRIECO: -- and for the --

14 THE COURT: Wells --

15 MR. GRIECO: -- trust, U.S. Bank, as trustee.

16 THE COURT: Okay.

17 MR. GRIECO: I have not heard from -- I guess this was
18 a proposed counsel.

19 THE COURT: Yeah.

20 MR. GRIECO: And I was told that Mr. Newton had given
21 my contact information. It's my understanding from my contact
22 with the Shapiro Firm (ph.), which was bankruptcy and
23 foreclosure counsel, that there was talk of a modification.
24 But I've had no status report from them since.

25 THE COURT: Do you know what the status of the

1 foreclosure action is?

2 MR. GRIECO: It's my understanding that this was a
3 nonjudicial foreclosure --

4 THE COURT: Foreclosure.

5 MR. GRIECO: -- notice, and it was stayed by a
6 bankruptcy, which has now been dismissed.

7 THE COURT: But the foreclosure hasn't been completed
8 yet?

9 MR. GRIECO: No, not to my understanding.

10 THE COURT: All right. Mrs. Jenkins, do you want to
11 say something else? Go ahead.

12 MS. JENKINS: Yes, sir. I just wanted to say we just
13 want to pay our mortgage and stay in our home. It was never
14 our intention to file an adversary complaint or file as a
15 creditor. But we felt we had no alternative but to do that
16 through all of the options and influences, even when we did
17 file for our bankruptcy in the State of Georgia, the judge,
18 paraphrasing, just basically jumped all over the foreclosing
19 because he saw our documentation, but we were paying our loan.
20 And he saw our documentation, where we went several tracking
21 years (ph.) successfully, yet they still -- they would start
22 foreclosure procedures.

23 We don't have an avenue in the State of Georgia, as
24 people keep saying.

25 THE COURT: All right. Let me --

1 MS. JENKINS: And I did -- sir?

2 THE COURT: What I was going to say, Mrs. Jenkins,
3 what I have before me is your amended complaint. Bear with me
4 a second. It was filed on May 20th, 2013, and it's ECF docket
5 number 32 in the adversary proceeding in this case. The matter
6 is scheduled today for a case management conference. That's
7 what I'm hearing. The amended complaint, which names numerous
8 defendants -- I have no idea whether it's been served or not --
9 is all I have before me. I mean, it's on file. There are no
10 motions that have been filed yet with respect to the amended
11 complaint.

12 Is anyone from Silverman Acampora here? Come on up to
13 the microphone.

14 MR. KRELL: Good morning, Judge. Justin Krell,
15 Silverman Acampora --

16 THE COURT: Right.

17 MR. KRELL: -- special counsel to the committee.

18 THE COURT: So have you had any communication recently
19 with Mrs. Jenkins?

20 MR. KRELL: I haven't, Your Honor. Prior to the May
21 hearing, I did speak with Mr. Brenner. Mr. Brenner intimated
22 to me that he was --

23 THE COURT: This was the lawyer who was considering --

24 MR. KRELL: Right. He wasn't retained.

25 THE COURT: -- retention?

1 MR. KRELL: He was going to try to --

2 THE COURT: Yes.

3 MR. KRELL: -- facilitate possibly the loans mods,
4 speak to foreclosure counsel and facilitate that process. But
5 he made it clear he was not going to appear in this court --

6 THE COURT: Right.

7 MR. KRELL: -- file any papers on behalf of the
8 Jenkins.

9 THE COURT: Right.

10 MR. KRELL: He was contacted prior to the Jenkins'
11 date for the amended pleading to be due. It appears that maybe
12 he did not provide any assistance in the Jenkins filing that
13 amended pleading. I haven't heard from him since that hearing
14 date.

15 THE COURT: Okay.

16 MR. KRELL: So I don't know if he's been in contact
17 with the Shapiro Firm and what the status is on the loan --

18 THE COURT: Let me ask this --

19 MR. KRELL: -- mod --

20 THE COURT: -- and -- Ms. Jenkins, the Silverman
21 Acampora firm is special borrowers' counsel to the creditors'
22 committee. They don't represent you, but they've been dealing
23 with borrowers' issues such as would be raised here.

24 I would ask that you once again reach out to Mrs.
25 Jenkins and perhaps provide some limited guidance about --

1 maybe some contact phone numbers about -- I -- you know, I
2 don't know who's holding the mortgage. I don't know who -- I
3 guess America's Servicing is the loan servicer. I guess any
4 effort for loan modification would have to be done through
5 America's Servicing. And perhaps, you can provide the --
6 contact information. Get an address in writing so you can send
7 a letter that includes the contact information so there is a
8 record that you provided it.

9 There are a number of programs, Mrs. Jenkins, that may
10 or may not be available for loan modifications; the so-called
11 HAMP program, H-A-M-P, Home Affordable Modification Program.
12 There are requirements to qualify for that. I have no idea
13 whether you would qualify. There may be other alternatives
14 also available. It is really important, if your bankruptcy
15 case has been dismissed, and so there's no stay in effect
16 against foreclosure, that if you're going to try and avoid a
17 foreclosure of your home you need to move very quickly.

18 The only thing before me right now is a complaint, and
19 I -- I'm fairly certain, because it's, if not identical, it's
20 almost identical to the earlier complaint on which the Court
21 granted the motion for a more definite statement on March 28th,
22 2013; it's at ECF docket number 26. The Court entered its
23 order granting debtors' motion pursuant to Federal Rule of
24 Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure
25 12(e) for a more definite statement. And I gave an opportunity

1 to file an amended complaint, and that's what's on the docket.
2 No motion is addressed to that yet.

3 Again, it does not appear from the docket that the
4 complaint has been served on anybody, nor was the earlier one.
5 But I would at least ask that special borrowers' counsel at
6 least follow up with Mrs. Jenkins and put in writing the
7 contact information you give her. Okay?

8 MR. KRELL: No problem. We'll --

9 THE COURT: All right. And I assume, Mr. Newton, in
10 due course, you'll file a motion addressed to this amended
11 complaint.

12 MR. KRELL: I -- could I ju -- Ms. Jenkins, is --
13 when's the last time you heard from Mr. Brenner?

14 THE COURT: Have you spoken to Mr. Brenner, Mrs.
15 Jenkins?

16 MS. JENKINS: Not since last week, on -- the last time
17 that he talked with you guys.

18 THE COURT: All right. So do you have Mrs. Jenkins'
19 contact information?

20 MR. KRELL: Yes, and I have Mr. Brenner's. So I'll --
21 I --

22 THE COURT: Why don't you -- if you'd follow up, I
23 would appreciate it. All right. Thank you very much, Mrs.
24 Jenkins. That's all for today on your case, okay?

25 MS. JENKINS: Okay. So do I know where we stand right

1 now? Are --

2 THE COURT: I --

3 MS. JENKINS: Is our case thrown out, because --

4 THE COURT: No, it's not thrown out, but it's -- the
5 case -- you filed the amended complaint. If the debtor is
6 going to make a motion and others make a motion to it, in due
7 course, that'll be considered. But there's nothing that -- no
8 order of this Court that prevents the loan servicer from moving
9 forward with foreclosure in Georgia. So you need to -- if
10 you're going to seek a loan modification, you need to move
11 forward very quickly with respect to that. All right? Tha --

12 MS. JENKINS: Your Honor, we are in the process of a
13 loan modification, and they now have all of our paperwork and
14 updated documents, financial statements, everything.

15 THE COURT: All right. I'm going to have --

16 MS. JENKINS: I do --

17 THE COURT: Mrs. Jenkins, what I'm going to do is I'm
18 going to have Mr. Newton -- in the first instance, maybe he'll
19 get you in touch with counsel for America's Servicing as well.
20 Since you're not represented by counsel, they can go ahead and
21 speak with you. It's -- if you've -- and maybe you can check
22 and find out whether your client has any loan modification
23 papers. If they participate in HAMP , I guess they can't move
24 forward with a foreclosure while there's a loan modifi -- if in
25 fact loan modification papers have been submitted, I believe

1 that they would have to await further action.

2 But that's not for me to decide.

3 MS. JENKINS: Your Hon --

4 MR. KRELL: And I can look into the status of the --

5 MS. JENKINS: Your Honor, may I --

6 THE COURT: Okay. All right. Counsel for the loan
7 serv -- Mrs. Jenkins, I have to end this hearing because I have
8 a lot more to be heard. Counsel is going to -- somebody will
9 be in touch with you further, okay? All right. So this --

10 MS. JENKINS: Okay.

11 THE COURT: -- matter's concluded. Let's move on on
12 the calendar. Thank you very much, Mrs. Jenkins.

13 Mr. Marinuzzi, who's going to go? Mr. Marinuzzi? Ms.
14 Martin?

15 MS. MARTIN: Good morning, Your Honor. Samantha
16 Martin from Morrison & Foerster, on behalf of the debtor.

17 Next on the agenda is the adversary proceeding filed
18 by Ms. Gwendolyn Hawthorne, case number 12-02050. Your Honor,
19 Ms. Hawthorne filed a complaint in November of 2012. We
20 initially extended the response deadline with this Court's
21 permission several times to see if the parties would be able to
22 reach a settlement. On April 3rd, 2013, Your Honor entered an
23 order directing the applicability of the borrower adversary
24 proceeding procedures to this matter. And as a result, on also
25 April 3rd, the debtors filed a notice thereof.

1 The notice required the parties to schedule and
2 conduct the initial conference by May 20th, and the parties did
3 hold the initial conference on May 15th; during which time, the
4 parties discussed the relief sought by Ms. Hawthorne and
5 potential settlement terms. Ms. Hawthorne was not represented
6 by counsel at the meeting, but her brother was present with her
7 and spoke on her behalf. During that conference, plaintiff
8 indicated an interest in a potential settlement involving
9 either a loan modification or a purchase of the note.

10 However, since the sale -- the servicing was
11 transferred to Ocwen in connection with the sale, I reached out
12 to Ocwen to explain plaintiff's interest and to see if they
13 would consult with plaintiff to pursue the settlement options.
14 We then sent plaintiff a loan modification package and also the
15 name, phone number and e-mail address for an attorney
16 representative at Ocwen. And it's my understanding that
17 they're working through that currently.

18 We held a second conference on May 21st, where we also
19 decided that the plaintiff would continue seeking this relief.
20 And as a result, we propose to reschedule the status conference
21 for July 10th.

22 THE COURT: All right, that's fine. Thank you very
23 much for the report.

24 MS. MARTIN: Thank you.

25 THE COURT: Okay. I appreciate it. All right. And I

1 guess the Solano is being withdrawn -- the adversary
2 proceeding's being withdrawn.

3 MR. NEWTON: That's correct, Your Honor.

4 THE COURT: Okay. Anything else on the agenda? Mr.
5 Marinuzzi or Ms. Martin?

6 MS. MARTIN: That concludes the agenda.

7 THE COURT: All right. So what we're going to do is
8 we're going to take -- Mr. Walper, do you want to proceed with
9 your cross-examination? Is that still your plan?

10 MR. WALPER: Yes, Your Honor.

11 THE COURT: Okay. Are -- Mr. Goren, are you prepared
12 to proceed?

13 MR. GOREN: We're ready to go now, Your Honor.

14 THE COURT: Let's take a ten-minute recess. And at
15 noon, we'll begin with, hopefully, a short examination of the
16 witness.

17 All right. So we're in -- take a ten-minute break.

18 (Recess from 11:48 a.m. until 12:05 p.m.)

19 THE COURT: All right, please be seated. Back on the
20 record in Residential Capital, number 12-12020.

21 Mr. Goren?

22 MR. GOREN: Thank you, Your Honor. This is on the
23 continued -- the paydown motion.

24 THE COURT: Correct.

25 MR. GOREN: Debtors would like to call to the stand

1 Marc Puntus.

2 THE COURT: Okay. Mr. Puntus.

3 If you would raise your right hand to be sworn?

4 (Witness Sworn)

5 MR. GOREN: May I approach, Your Honor?

6 THE COURT: Yes, please.

7 DIRECT EXAMINATION

8 BY MR. GOREN:

9 Q. If you could just give your name and experience very
10 briefly for the Court, Mr. Puntus?

11 A. Sure. My name is Marc Puntus. I am a partner and co-head
12 of the restructuring group at Centerview Partners. We are the
13 investment bankers for ResCap.

14 Q. And can you please take a look at Exhibit 1 which should
15 be there in front of you?

16 A. I have it.

17 Q. Do you recognize that document?

18 A. I do.

19 Q. Can you explain what it is?

20 A. It's my declaration in support of the extend motion.

21 Q. Okay. And does that declaration represent your views on
22 the case at the time you gave the declaration?

23 A. It does.

24 Q. Okay. And if you could briefly describe for the Court
25 what factors the debtors evaluated in determining to make the

1 paydown motion.

2 A. As the declaration reflects, both the AFI credit
3 facilities as well as the junior secured notes continue to
4 accrue interest during the case. We've been paying interest
5 under the AFI facilities at approximately three-million dollars
6 a month during the case. By virtue of this motion and the
7 paydown of approximately 1.1 billion dollars in claims under
8 that motion, we will be saving approximately three million
9 dollars a month in interest which savings will inure to the
10 benefit of the unsecured creditors.

11 From a purely economic perspective, putting aside
12 litigation issues, it makes sense to pay down those claims and
13 we focused on that. With respect to the junior secured notes,
14 there is the dispute as Mr. Uzzi mentioned as to whether junior
15 secured notes are oversecured or not and whether they're
16 entitled to post-petition interest. The purpose of paying them
17 down by approximately -- by 800 million dollars is to de-risk
18 the estate. By virtue of that paydown, to the extent those
19 notes are oversecured, the estate will be saving between six-
20 and-a-half and seven million dollars a month in interest which
21 also will inure to the benefit of the unsecured creditors of
22 the estate.

23 An important factor, as has been mentioned in the court,
24 in all of this was the resolution or the compromise and
25 settlement we've reached with AFI with respect to the claims

1 that the estate has against it and the global resolution which
2 will be pending before the court on June 26th. Prior to that
3 resolution, we intended to proceed with paying down the junior
4 secured notes to de-risk the estate. Nobody disputes that they
5 are secured, at the very least, to the tune of 800 million
6 dollars, but we did not propose as a practical matter to pay
7 down AFI. By virtue of the resolution or at least the
8 compromise of those claims, and the fact that substantially all
9 the stakeholders in the case have signed onto it, we determined
10 that saving three million dollars a month in interest was
11 prudent, mindful of the fact that we reserve the right in the
12 order to seek disgorgement of those claims or
13 recharacterization of those loans at a later date.

14 Q. And even absent approval of this settlement with the
15 reservation of rights, do you have a view as to whether the
16 paydown is appropriate?

17 A. Yeah. Well, look, we're quite comfortable -- I'm quite
18 comfortable with AFI's financial security and their financial
19 wherewithal. So as a purely business matter, purely as a
20 business matter even absent a resolution of the settlement, as
21 long as we reserve the appropriate rights, we're comfortable
22 that they will have the liquidity to pay, to the extent that
23 they are forced to disgorge those claims or those amounts at a
24 later date.

25 Q. And do you know how much cash the debtors are currently

1 holding? It's in paragraph 5 of your declaration, if you don't
2 recall.

3 A. I know we received approximately 4.1 million in -- 4.1
4 billion in gross proceeds from the asset sales and I believe we
5 hold approximately 3.5 billion dollars of cash, excluding
6 restricted cash.

7 Q. And what type of return are the debtors currently earning
8 on that?

9 A. Unfortunately, as a consequence of the restrictions
10 imposed by the Code and the U.S. Trustee, we're really, as I
11 understand it, earning very little return. In fact, I believe
12 our cash only affords the debtor business credits at this
13 point. I think the debtors have had an opportunity to earn a
14 de minimis return and by de minimis, I would say between
15 twenty-five and fifty basis points. So between a quarter and a
16 half-a-point of interest, but unfortunately have been unable to
17 even earn that return as a consequence of some requirements
18 imposed by the U.S. Trustee which JP Morgan who would be the
19 custodian of the funds was unwilling to agree to.

20 So effectively, we're earning some business credits, but
21 earning little to no return on the cash in the estate.

22 Q. And how, with it all, did potential settlement dynamics
23 with the junior secured notes play in determining to make the
24 motion?

25 A. I think we are in the midst of a negotiation and

1 potentially a litigation with the junior secured notes and as
2 Mr. Uzzi mentioned, the smaller the amount in dispute, the
3 easier it will be to settle. And so I think we all
4 concluded -- and, frankly, it's been our conclusion -- that we
5 should pay more to the junior secured notes. We should pay
6 down an amount that everybody, the debtors, the creditors'
7 committee, Ally and other stakeholders, believe is
8 uncontestably (sic) secured because it saves the estate, to the
9 extent that they are oversecured and the debtors are wrong, it
10 saves the estate twenty million dollars or more a month. It's
11 simple math and we took that into account in our analysis.
12 Q. And you mentioned earlier that you have evaluated AFI's
13 credit risk. Can you explain how you assessed that?
14 A. Sure. We did not do a detailed, you know, due diligence
15 examination. We've taken a look at their 10K's and their
16 10Q's, their public filings as is reflected in the document
17 that was prepared, you know, by me and my colleagues and has
18 been, I think, admitted as Exhibit 2. We took a look at the
19 balance sheet; we took a look at the income statement; we took
20 a look at the cash on the balance sheet; we took a look at
21 AFI's ability to access the debt capital markets which they've
22 done most recently on April 15th. And based upon that
23 analysis, we concluded that we were, in the context of all the
24 facts, we were comfortable with their financial ability to
25 repay this amount to the extent they need to at some future --

1 THE COURT: Tell me what Exhibit 2 is?

2 THE WITNESS: Exhibit 2, really, Your Honor, is a
3 summary of the key financials embedded in AFI's 10K and 10Q.
4 So it summarizes the balance sheet --

5 THE COURT: Prepared by you or your colleagues?

6 THE WITNESS: Prepared by me and my team.

7 Page 1 summarizes the balance sheet. I think the key
8 point is AFI -- and AFI's financials include ResCap. You can't
9 separate out ResCap. But AFI has upwards of 100-billion
10 dollars in assets, 166 billion in the aggregate including
11 ResCap; it has 23 billion dollars in cash; it has net book
12 equity of approximately 20 billion dollars. Those were some
13 important factors with respect to the balance sheet.

14 As to ability to commit capital or funding, AFI has
15 approximately sixteen billion dollars in committed funding
16 facilities that are undrawn that could be used to satisfy
17 amounts here to the extent these amounts were disgorged. And
18 on page 3, I think the pertinent factor is AFI doesn't -- AFI
19 is a profit-making business in the aggregate. During the last
20 year, it generated approximately 5.2 billion dollars in cash
21 flow; it generated two billion dollars during the first quarter
22 of this year. And most importantly for us, it tapped the
23 unsecured debt markets as recently as April of this year,
24 raising 3.4 billion dollars of debt with coupons ranging from
25 2.3 percent to 3.2 percent.

1 So taking into account all those factors and our
2 general knowledge of AFI's business in the aggregate, you know,
3 we're quite comfortable with whatever modest risk might exist.
4 We're quite comfortable that the benefit to the estate far
5 outweighs that modest risk.

6 MR. GOREN: No further questions, Your Honor.

7 THE COURT: Are you going to move these into evidence?

8 MR. GOREN: Yes. I would like to move Exhibits 1 and
9 2 into evidence.

10 THE COURT: Any objections?

11 MR. WALPER: No objection, Your Honor.

12 THE COURT: All right. Exhibits 1 and 2 are admitted
13 in evidence.

14 (Marc Puntus' declaration was hereby admitted as Debtors'
15 Exhibit 1, as of this date.)

16 (Centerview's analysis of AFI's credit risk was hereby admitted
17 as Debtors' Exhibit 2, as of this date.)

18 THE COURT: Thank you. Cross-examination?

19 Well, first, anybody who's supporting the motion wish
20 to examine further before we -- all right, Mr. Walper, go
21 ahead. Cross-examination.

22 MR. WALPER: Thanks, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. WALPER:

25 Q. Good afternoon, Mr. Puntus.

1 A. Good afternoon, Mr. Walper.

2 Q. So could -- I've now had a chance to review Exhibits 1 and
3 2. Exhibit 2 was prepared when?

4 A. Yesterday.

5 Q. Okay. And is it my understanding that Clearview (sic)
6 Partners has advised the company with respect to whether or not
7 it's appropriate to make the -- repay AFI with respect to its
8 first priority loan?

9 A. Centerview Partners has, yes.

10 Q. Excuse me, Mr. Puntus.

11 A. It's all right.

12 Q. Okay. And at the time that your declaration was signed in
13 Connecticut this motion, is it the case that Exhibit 2 had not
14 yet been prepared?

15 A. The exhibit didn't exist; the information which underlies
16 the exhibit existed and had been reviewed by me and my team.

17 Q. So is it fair to say that prior to giving your
18 declaration, that you had analyzed the public information with
19 respect to AFI and your recommendation was based upon?

20 A. Correct -- prio -- my recommendation was principally based
21 upon the savings which will be enjoyed by the estate by virtue
22 of paying down both the AFI facilities and the JSN and,
23 secondarily, by virtue of my knowledge of AFI and Ally's
24 business balance sheet and finances. And, yes, we had reviewed
25 the Q's and the K's and we were quite comfortable with their

1 financial wherewithal.

2 Q. And had there been management with Centerview input
3 discussion concerning the credit risk, if you will, of AFI
4 prior to, say, June 10th?

5 A. There wasn't much discussion; we discussed it briefly.
6 And the reason there wasn't much discussion is that nobody was
7 particularly concerned about the credit risk of AFI.

8 Q. Did you consider what steps would have to be taken in the
9 event that the payment was made, the plan's support agreement
10 or the ultimate settlement at confirmation with AFI was not
11 approved?

12 A. It sounds like a legal question, but my assumption would
13 be that to the extent we had repaid them and the PSA was not
14 approved and the plan and disclosure state -- the plan was
15 ultimately not confirmed and we were back in litigation mode,
16 then I -- my assumption would be is that somebody would need to
17 file an adversary proceeding to seek disgorgement of those
18 clai -- those proceeds on whatever legal basis they believed
19 existed.

20 But as I said, we were quite comfortable and still are
21 quite comfortable with AFI's financial wherewithal to pay those
22 monies back as well as their financial wherewithal, by the way,
23 to pay 2.1 billion dollars which they've agreed to pay as part
24 of the overall global settlement.

25 Q. That was "billion", correct?

1 A. 2.1 billion.

2 Q. Yes.

3 A. Did I say "million"? I apologize.

4 Q. Just wanted to make sure it was clear.

5 A. Sure.

6 Q. And was there any consideration in connection with giving
7 your view to management and making the decision as to how long,
8 in the event that ResCap needed to seek return of those funds,
9 how long that that litigation, the adversary proceeding might
10 take to reach resolution?

11 A. I -- not from me, no.

12 Q. Do you think that that's relevant?

13 A. I suppose it could be relevant in some small fashion.

14 Q. And what is the small fashion in which you think it might
15 be relevant?

16 A. If you're asking whether we have projected out AFI's
17 financials two years or three years, so as to come to a similar
18 conclusion as to their financial wherewithal, we haven't done
19 that. Although my strong suspicion or my strong inclination
20 is, is that had we done that, our conclusion would not have
21 changed.

22 Q. And what do you base that suspicion on?

23 A. Based upon their financial wherewithal. It's a very
24 strong business. AFI is a very strong and profitable business;
25 they've been, as I said, they've been -- they generated five-

1 billion dollars in cash flow last year. They continue to
2 dispose of assets on a profitable basis, and the business is a
3 good credit. They have accessed the credit markets, not on a
4 secured basis, but on an unsecured basis at very low rates of
5 interest.

6 All those things tell me it is a good, strong, profitable
7 business.

8 Q. Are you familiar with the Fitch Rating for short-term debt
9 of AFI as disclosed in their last 10Q?

10 A. I am generally familiar with what a Fitch Rating is. I'm
11 not specifically familiar with what their rating is her or what
12 the rating is on their short-term debt.

13 Q. Would it surprise you to hear that it was C-rated?

14 A. No.

15 Q. Um-hum. With respect to Fitch's Rating, are you familiar
16 with that?

17 THE COURT: I'm sorry; I don't understand your
18 question, Mr. Walper.

19 Q. With respect to the Fitch Rating of AFI, are you familiar
20 with that rating?

21 A. I don't understand the question, either. I don't
22 understand it differently from the prior question.

23 Q. Well, that was S&P.

24 A. No, I think the prior question was Fitch.

25 THE COURT: No, you asked him about Fitch.

1 MR. GOREN: Okay, excuse me.

2 THE COURT: That's why we're all confused.

3 MR. GOREN: Maybe the time difference, Your Honor? I
4 apologize.

5 Q. Let me correct the record and say --

6 THE COURT: it's 9:30 in the morning for you, Mr.
7 Walper. Come on, you know?

8 MR. WALPER: Well, I've been up all night.

9 THE COURT: Preparing for this cross-examination?

10 MR. WALPER: Apparently.

11 UNIDENTIFIED SPEAKER: I doubt it, Your Honor.

12 THE COURT: I'm sorry to tease. Go ahead.

13 MR. WALPER: No, no, it's completely appropriate, Your
14 Honor.

15 Q. So the reference to C was an S&P rating and I apologize to
16 the Court and to the witness. But I assume that your answer
17 would be the same as to that?

18 A. Correct.

19 Q. Okay. And with respect to Fitch, would it surprise you if
20 the rating were "Watch Negative" with respect to AFI?

21 A. No.

22 Q. Okay. Are you familiar with the government's stress
23 testing of AFI with its peers, or in particular, Ally Bank with
24 its peers?

25 A. I'm familiar generally with the government's stress

1 testing of banks. Ally Bank, not AFI; Ally Bank.

2 Q. Um-hum. And do you know how Ally Bank came out in the
3 last stress testing performed?

4 A. I believe they failed that stress test.

5 Q. Um-hum. And do you know what the government thought that
6 a passing grade would be of banks of similar size?

7 A. I don't have that information in front of me, so no.

8 Q. Okay. Well, it is contained in the 10Q.

9 A. I'm sorry; your voice trailed off. It's contained where?

10 Q. In the 10Q.

11 MR. WALPER: Sorry, Your Honor.

12 Q. So you, no doubt, have been in the banking community,
13 whether it be on the restructuring side or the non-
14 restructuring side back in 2007 and 2008, is that correct, Mr.
15 Puntus?

16 A. That is correct.

17 Q. Okay. So you no doubt experienced the recession that we
18 all experienced, but in particular became acute in the last
19 couple of quarters of 2008, correct?

20 A. I was around.

21 Q. Yes. So do you feel like -- are you of the opinion that
22 ResCap would have any difficulty collecting any judgment
23 against Ally or in recovering the 1.1 billion dollars if we
24 happen to experience the same level or even close to the same
25 level of recession, which I think many of us did not predict,

1 sometime in the near future?

2 A. I express no opinion whether, if the world ends and we
3 have another housing collapse and the debt capital markets
4 evaporate, whether Ally or anybody else would be able to
5 satisfy their obligations. What I do and have testified to is
6 the fact that based upon the current circumstances, the current
7 financial condition of AFI and Ally, the facts and
8 circumstances associated with the case, most importantly the
9 global resolution which is pending as well as the interest to
10 be saved, potentially twenty-three million dollars aggregating
11 AFI and the junior secured notes, twenty-three million dollars
12 a month for at least five or six more months, that's a
13 substantial amount of money. In that context, to the extent
14 there is any risk -- and there is risk in everything in life --
15 we believe it's a risk worth taking.

16 Q. Do you have any reason to believe that we're not going to
17 experience, in a period of time which would reflect the time it
18 would take to recover under an adversary proceeding these
19 funds, that we're not going to experience a recession like we
20 did in 2008?

21 A. We may experience a recession; we may not. I'm not an
22 economic forecaster so I have no opinion. I think the
23 likelihood we experience something of the sort -- of the
24 magnitude and severity of what we experienced in late -- in
25 2008, it seems unlikely but not impossible.

1 Q. All right. But then again, you said that you're not
2 qualified to do that, correct?

3 THE COURT: He didn't say that.

4 A. Well, you asked me the question. I said I'm not an
5 economic forecaster. Are you?

6 THE WITNESS: Sorry, Your Honor.

7 Q. No, I confused S&P and Fitch.

8 A. You were up late last night.

9 THE COURT: He doesn't have to answer your question.

10 THE WITNESS: That's true.

11 MR. WALPER: No. I do not, but I'll go under oath.

12 Q. One last question, Mr. Puntus, and I appreciate you taking
13 the stand.

14 With respect to the interest you've referred to, in the
15 event that only the Ally portion was not paid and that in this
16 hearing as to the payment of Ally was continued for three
17 weeks, how much interest would accrue?

18 A. You're asking to the extent we do pay the JSNs, don't pay
19 Ally, and we continue it for three weeks, and then make the
20 paydown? It's a million-and-a-half to two million dollars.

21 Q. Okay, thank you.

22 MR. WALPER: No further questions.

23 THE COURT: Thank you.

24 Any other cross-examination?

25 All right. Redirect?

1 MR. GOREN: Thank you; Todd Goren.

2 REDIRECT EXAMINATION

3 BY MR. GOREN:

4 Q. Mr. Walper mentioned the stress test. And do you have an
5 understanding as to which entity was stress-tested?

6 A. Yeah, Ally Bank. Not AFI; Ally Bank.

7 Q. And who is the lender under the Ally facilities?

8 A. AFI.

9 MR. GOREN: No further questions, Your Honor.

10 THE COURT: All right.

11 Do you wish to argue, Mr. Walper?

12 MR. WALPER: I do. But I have one --

13 THE COURT: Go ahead.

14 MR. WALPER: Thank you.

15 THE COURT: I'm sorry.

16 RECROSS-EXAMINATION

17 BY MR. WALPER:

18 Q. I think in Exhibit 2, there's a reference to net book
19 value of AFI. How much of that net value is attributable to --

20 THE COURT: Just point me to the right place in the
21 exhibit.

22 THE WITNESS: It's page 1, I believe --

23 MR. WALPER: Yes.

24 THE WITNESS: -- you're referring to.

25 MR. WALPER: It's the first bullet in the report.

1 THE COURT: Okay, go ahead.

2 Q. How much of that is attributable to Ally Bank?

3 A. I don't have the breakout. AFI doesn't break out AFI's
4 business from Ally's business or ResCap's business in its
5 financials.

6 THE COURT: All right. You're excused.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Do you want to argue, Mr. Walper?

9 MR. WALPER: Thank you, Your Honor. We are where we
10 were and while, certainly, Mr. Puntus' testimony would reflect
11 that there was thought around the issue of what would happen in
12 the event that the money needed to come back to the ResCap
13 estate, we firmly believe that a -- since the beginning of the
14 case, they have -- AFI has been unpaid, that a short
15 continuance of this hearing, to give Berkshire comfort that the
16 plan support agreement would be approved and that there was an
17 opportunity to see the examiner's report, is very little when
18 compared to the risks associated with paying them only to find
19 that if the plan is not confirmed or the settlement is not
20 approved, that the estate would have to chase AFI to receive
21 these payments. Whether that risk is associated with long-term
22 litigation which is expensive or whether there's federal
23 regulations that get in between the payment; whether there's a
24 long appeal or, you know, the devastating case -- which none of
25 us could predict before but we're talking about fiduciary funds

1 here, okay -- that there is some recession --

2 THE COURT: Well, when you say we're talking about
3 fiduciary funds, whether AFI's security interest can
4 subsequently be challenged or not, meaning whether their claims
5 could be subordinated or not, you don't -- you have not
6 disputed the fact that, as it stands today, AFI has a secured
7 claim against the debtors. That's, on the face, oversecured.
8 Consequently, they continue to be entitled to post-petition
9 interest.

10 So it's not as if the debtor is proposing to just pay
11 1.1 billion dollars in the hope of getting it back. The quid
12 pro quo is they're eliminating the secured debt. If -- it may
13 be challenged. It may be overturned, ultimately. But -- so
14 when you say, yeah -- yes, they are a fiduciary, but it's not
15 as if there's -- they're taking funds that are to satisfy some
16 unencumbered claim that --

17 MR. WALPER: I appreciate that point, but that -- if
18 that was the point that you heard, that was not necessarily the
19 point I --

20 THE COURT: Okay.

21 MR. WALPER: -- I was attempting to make, Your Honor.
22 Back to the sleep (ph.). The point I'm making is that these
23 funds are fiduciary funds because you can pay them to AFI, but
24 then AFI has committed to pay 2.1 billion dollars to the
25 estate. So in fact, if we weren't where we were, and we had

1 the settlement here today, we'd probably be setting off those
2 amounts as opposed to paying them --

3 THE COURT: I don't know whether you would or not.
4 I -- you know --

5 MR. WALPER: And -- and so what I'm doing is liking
6 those funds -- comparing them to fiduciary funds that you'd
7 want to protect, you know, against the potential dissipation by
8 investing them in a C rated company, where this is no escrowing
9 of the funds and where there is no clear path to quickly
10 getting them back in the event that the settlement is not
11 confirmed.

12 THE COURT: Okay.

13 MR. WALPER: Thank you, Your Honor.

14 THE COURT: Thank you very much. Mr. Goren?

15 MR. GOREN: Thank you, Your Honor. I -- Mr. Walper
16 raises some fair points, but the fact is, as you noted, that
17 the standard to approve this motion is the business judgment
18 rule. And as the testimony of Mr. Puntus made clear, the
19 debtors evaluated all of those factors in consultation with the
20 creditors' committee, each of its nine members, all of their
21 advisers, including the individual advisers, and concluded that
22 making the pay-down motion was in the best interest of the
23 estate.

24 And that, I believe, is clearly a valid exercise of
25 the debtors' business judgment under these circumstances.

1 THE COURT: All right, thank you. Anybody else wish
2 to be heard?

3 All right. Pending before the Court is the debtors'
4 motion for entry of an order under 11 U.S.C. Sections 105 and
5 363, authorizing the debtors to partially satisfy certain
6 secured claims. That motion was filed at ECF 3626, and it
7 sought approval of an 800 million dollar payment to partially
8 satisfy the secured claim filed by the junior secured
9 noteholders of the 9.625 percent of the junior secured
10 guaranteed notes due 2015.

11 The partial satisfaction of the JSN claim is intended
12 to curb the accrual of post-petition interest in the event the
13 Court determines the JSN's are oversecured. The motion is
14 supported by the declaration of Marc D. Puntus, which is at ECF
15 3671. The Court has admitted it in evidence as Exhibit 1.

16 And on June 3rd, 2013, the debtors filed the debtors'
17 amended motion for entry of an order under Section -- under 11
18 U.S.C. Sections 105 and 363, authorizing the debtors to satisfy
19 certain secured claims. That's at ECF 3872, and it seeks, in
20 addition to the payment to the JSN's, approval of a payment of
21 \$1,127,127,553.39 to AFI to satisfy AFI's claim -- claims under
22 a secured loan agreement and secured -- senior secured credit
23 facility. And that amended motion is supported by the
24 additional declaration of Marc D. Puntus. I guess that's
25 actually the declaration that I -- it's actually the additional

1 declaration that's been admitted into evidence.

2 MR. GOREN: That's correct, Your Honor.

3 THE COURT: All right. And as I sa -- okay.

4 One limited objection to the amended motion was filed
5 by Berkshire Hathaway. That's at ECF 3893, and it objects to
6 the payment to AFI as premature. The debtor, AFI and the
7 committee have all filed replies to the Berkshire objection.
8 Those are at ECF 3933, 3934 and 3935. For the reasons that
9 I'll explain, the Court approves the debtors' amended motion
10 authorizing the payments to AFI and the junior secured
11 noteholders.

12 I won't go through the entire background with respect
13 to the details about the junior secured notes. I've already
14 mentioned that to the extent that they're oversecured they'd be
15 earning post-petition interest at the rate of 9.625 percent.

16 With respect to AFI, on December 30th, 2009, the
17 debtors, RFC and GMACM, two of the debtors and certain of the
18 other debtors as borrowers, ResCap as guarantor and AFI as
19 agent and lender, entered into a 1.1 billion dollar amended and
20 restated secured loan agreement in order to consolidate under
21 one agreement, the terms and provisions of two secured credit
22 agreements with AFI entered into on November 30th, 2008 and
23 June 1, 2009, respectively, as well as the loans made those
24 agreements. The outstanding principal amount under the AFI
25 LOC, as of petition date, was approximately 380 million

1 dollars.

2 Additionally, on December 30th, 2009, the debtors, RFC
3 and GMACM, as borrowers, and various debtor affiliates as
4 guarantors, entered into a loan agreement with AFI as agent and
5 lender -- I'll refer to that as the AFI senior secured credit
6 facility -- amending and restating in its entirety the original
7 loan agreement entered into on June 4th, 2008. The senior --
8 the AFI senior secured credit facility was originally a
9 revolving loan facility, with the outstanding amount was
10 converted into a term loan in connection with the amendment and
11 restatement. As of the petition date, the outstanding
12 principal of the AFI senior secured credit facility was
13 approximately 747 million dollars.

14 And the AFI senior secured credit facility is secured
15 by a first priority lien on the assets that secure the junior
16 secured notes. In pursuant to the original cash collateral
17 order, the debtors have paid interest at the nondefault rate on
18 a current basis throughout the cases.

19 In connection with the incurrence of the debt that
20 I've referred to, the debtors, ResCap, GMA -- ResCap, GMACM and
21 RFC entered into a certain intercredit agreement dated as of
22 June 6th, 2008. I'll skip the parties to it. It's a long
23 list.

24 On May 15th, 2010, the senior secured notes were
25 repaid at maturity, and the junior secured notes effectively

1 stepped into the position of the senior secured notes.

2 With respect to the debtors' cash position, the
3 debtor -- debtors received approximately 4.1 billion dollars in
4 gross sale proceeds in connection with the sale of its mortgage
5 loan origination and servicing platform to Ocwen and the sale
6 of its Legacy loan portfolio to Berkshire Hathaway. The
7 debtors used this cash, in part, to pay off in full the AFI DIP
8 facility and the Barclays DIP facility, as well as other pre-
9 petition facilities, including the Citibank MSR facility and
10 the FNMA EAF facility. And as of March 31, 2013, the debtors
11 have approximately 3.5 billion dollars in net cash, excluding
12 restricted cash, of which 1.7 billion in cash constitutes
13 proceeds of the collateral securing the AFI senior secured
14 credit facility and the junior secured notes, plus there are
15 substantial other assets remaining to be monetized.

16 And the debtors' cash is primarily held in multiple
17 accounts with various institutions. And as Mr. Punt's
18 testimony indicated, there -- the debtors' earning practically
19 nothing on the cash that's -- they're holding.

20 Based on the current budget, the debtors anticipate
21 that even after the proposed payments for the AFI claims and
22 the JSN secured claims, the remaining JSN cash collateral and
23 the other noncash collateral securing the junior secured notes
24 will be sufficient to pay all receipts, expenses and interest
25 allocable to such collateral pursuant to the original cash

1 collateral order or nonconsensual cash collateral order as
2 applicable.

3 The debtors' motion details the benefits to the estate
4 if it's authorized to make these payments. I won't go through
5 those in detail. They're set forth in the papers. And I guess
6 the basic point is the very substantial interest savings that
7 will occur if the AFI and JSN's payments are approved by the
8 Court. While the debtors believe that the JSN's are
9 undersecured, the debtors seek to make the payments to limit
10 the risk that the JSN's prevailed in the adversary proceedings
11 that are pending to determine whether they're oversecured or
12 undersecured. And if it turns that the JSN's are oversecured,
13 this will avoid very substantial post-petition interest that
14 would be due.

15 The debtors amended the motion, in part, to align it
16 with the motion to approve the plan support agreement, which is
17 scheduled to be heard by the Court on June 26th. The debtors,
18 in the motion, would appear to acknowledge that AFI is
19 oversecured and has been making interest payments on a current
20 basis to AFI during the case. The payment to AFI would be
21 subject to a reservation of rights in the event the plan PSA is
22 not approved and a plan is not confirmed. There's no doubt
23 that any effort to recover that money, in all likelihood, would
24 have to be done through a -- an adversary proceeding. I'm not
25 making any determination of that now, but that seems to be the

1 view of the parties. And I don't underestimate the length or
2 complication of such a proceeding.

3 Berkshire Hathaway's objection primarily foc -- the --
4 they really requested the Court delay any ruling on the
5 request, at least until -- to see whether the plan support
6 agreement is approved and also until the examiner's report is
7 released. Based on the motion that's pending before me and
8 based on my knowledge of the credit agreements and
9 intercreditor agreement, it is questionable whether the debtors
10 could pay the 800 million to the JSN's without also paying the
11 1.1 billion to AFI. I'm not making a decision on that. The
12 motion itself is styled -- requires the payment approval of
13 both payments, not one or the other but both.

14 The primary issue that Berkshire has raised in its
15 objection in -- and in argument today is the credit risk that
16 would be faced if the debtor or committee or other parties were
17 seeking to recover the payments from AFI.

18 In addition to the Puntus declaration, which the Court
19 admitted as Exhibit 1, the Court also heard the direct and
20 cross-examination of Mr. Puntus from the witness stand today.
21 And he addressed in large measure the evalua -- the debtors'
22 evaluation of the credit worthiness or credit risk associated
23 with making the payment to AFI.

24 So the legal standard for the issues before the Court,
25 Section 363(b)(1) provides that the trustee, after notice and

1 hearing, may use sale or lease other than in the ordinary
2 course of business property of the estate. In approving a
3 transaction conducted pursuant to Section 363(b)(1), the courts
4 consider whether the debtor exercised sound business judgment.
5 See in re Chateaugay Corp, 973 F.2d 141 at 144-45, Second
6 Circuit 1992, (approving sale of assets based on a finding that
7 sound business judgment supported sale because delay in the
8 sale of assets may diminish their value).

9 See also Committee of Equity Security Holders v.
10 Lionel Corp, in re Lionel Corp. 722 F.2nd 1063 at 1072, Second
11 Circuit 1983 (holding that the sale of assets out of the
12 ordinary course of business must be supported by "some
13 articulated business justification other than the appeasement
14 of major creditors" and that "a judgment determining a Section
15 363(b) application must expressly find from the evidence
16 presented before him at the hearing a good business reason to
17 grant such an application").

18 Once the trustee articulates a sound business
19 justification, there is "a presumption that in making a
20 business decision the decision maker acted on an informed
21 basis, in good faith and in the honest belief that the action
22 was in the best interest of the company." Offic -- see
23 Official Committee of Subordinated Bondholders v. Integrated
24 Resources Inc., 147 B.R., 650 at 656, Bankruptcy Court Southern
25 District of New York, 1992. Appeal dismissed 3 F.3d, 49,

1 Second Circuit 1993.

2 Applying the business judgment standard that's set
3 forth in the cases that I've discussed and many others that
4 elaborate and support the same legal proposition and
5 considering the facts, both in the Puntus declaration, which is
6 Exhibit 1, the AFI financial overview, which is admitted into
7 evidence as Exhibit 2, and based all -- on all of the -- and
8 the cross -- the exam -- direct examination and cross-
9 examination of Mr. Puntus today, the Court concludes that the
10 debtor has established, by preponderance of the evidence, that
11 the debtor appropriately exercised its business judgment its
12 decision to seek approval to make the payments to AFI and the
13 JSN's.

14 In exercising its business judgment, the certain --
15 the standard is certainly not a certainty that -- in here, in
16 the event that the PSA is not approved, the plan is not
17 confirmed that the debtor will be able -- certainty that
18 they'll be able to recover being advanced to AFI. There are no
19 doubt serious claims that can be pressed against AFI. The
20 committee was seeking STN authority to go ahead and prosecute
21 claims against AFI. And while it had not filed a draft
22 complaint, the senior unsecured noteholders, I guess,
23 represented by Mr. Moloney, had also sought STN authority, had
24 in fact filed a complaint.

25 So there's no doubt that there would be serious claims

1 that could be asserted against Ally, and I also have no doubt
2 that Ally would vigorously defend against all of them and that
3 the amounts that would be sought in any such litigation would
4 substantially exceed the 1.1 billion dollars, the approximate
5 amount that is -- will be paid to Ally to satisfy their secured
6 claim at this point. In discussion today as to whether there'd
7 be claims to subordinate or recharacterize Ally's secured
8 claims in this case, I'm sure there would be many other
9 theories that would be pursued. And I have no doubt that that
10 would be complicated, major litigation that would tax the
11 resources of the debtor and Ally in defending.

12 But again, certainty is not the standard that is
13 applied in -- when a Court reviews the exercise of business
14 judgment by a debtor. The Court does not substitute its own
15 business decision for that of the debtor. Under all the
16 circumstances present here, the Court concludes, based on the
17 evidence and the argument, that the debtor has established by
18 preponderance of the evidence that it is exercised appropriate
19 business judgment in determining to make these payments. And
20 therefore, the debtors' motion, as amended, is granted.

21 The order should reflect that for the reasons stated
22 by the Court the motion is granted. All right. Mr. Goren.

23 MR. GOREN: Thank you, Your Honor. One last point I
24 wanted to just raise briefly. As Mr. Puntus noted on the
25 stand, we are in discussions with the parties about a potential

1 increase paid out into the JSN's. I don't believe Mr. Walper's
2 objection even went to that, if he's even supportive of the --

3 THE COURT: He seems to be happy --

4 MR. GOREN: -- payout --

5 THE COURT: -- when they're getting --

6 MR. GOREN: Yes.

7 THE COURT: -- their money, but --

8 MR. GOREN: So I --

9 THE COURT: I'm -- that doesn't call for a response,
10 Mr. Walper, okay? You're welcome to, but --

11 MR. WALPER: I'm tired, Your Honor.

12 THE COURT: You're welcome to. Okay. He wants to pay
13 you more money, Mr. Walper.

14 MR. GOREN: So I was just rising to ask that if --
15 assuming we can get all of the committee, the Ally, the junior
16 bonds with an increased paid-out, and then we could just submit
17 a stipulation to the Court authorizing the paid-out and --
18 rather than having to put out another motion.

19 THE COURT: What you can do is submit on presentment
20 so that if the U.S. trustee, for example, or any other party-
21 in-interest wishes to object, they can. They'll have the time
22 to object. If there are no objections, I'll deal with it
23 accordingly. But it's going to require more than -- you can do
24 a --

25 MR. GOREN: Okay.

1 MR. WALPER: -- you can do a stipulation, but you're
2 going to have to it on presentment so that any other party-in-
3 interest has an opportunity to object.

4 MR. GOREN: Very good, Your Honor.

5 THE COURT: Okay? Mr. Walper, you want to be heard?
6 And I didn't mean to tease, Mr. Walper. I --

7 MR. WALPER: I just wanted to say --

8 THE COURT: You usually -- you take it in good
9 fashion.

10 MR. WALPER: I just want to --

11 THE COURT: I shouldn't assume.

12 MR. WALPER: I just want to thank the Court for the
13 time.

14 THE COURT: Okay.

15 MR. WALPER: I really appreciate it.

16 THE COURT: Thank you very much. All right.

17 MR. WALPER: Thank you.

18 THE COURT: Thank you. We're adjourned.

19 (Whereupon these proceedings were concluded at 12:52 p.m.)
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sharona Shapiro

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber CET**D-492

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New York, NY 10040

Date: June 13, 2013

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